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To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law

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"[L]awyers know, if others do not, that what may seem technical may embody a great tradition of justice . . . ."[1]

INTRODUCTION

Federal courts of appeals often grant special deference to district court rulings on matters of state law.[2] This practice is important.[3] It is also ill-conceived.

This Article explores this "rule of deference."[4] Section I considers the roots and reach of the rule. Together with the Appendices to this Article,[5] it seeks to detail for practitioners, commentators, and judges the way the rule operates in the courts. The remaining sections of this Article consider the wisdom of the rule of deference. Section II argues that the rule lacks a sound rationale and Section III urges that the rule has bad effects not yet considered by the courts. Section IV suggests that the rule of deference offends *Erie R.R. Co. v. Tompkins*[6] by producing second-rate appellate review of state

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1. Kotteakos v. United States, 328 U.S. 750, 761 (1946).

2. J. MOORE, W. TAGGART, A. VESTAL & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.309[2], at 3127-29 n.28 (2d ed. 1987) [hereinafter MOORE'S FEDERAL PRACTICE].

3. *See infra* notes 15-16 and accompanying text.

4. The term is the author's. Courts have not given this practice a shorthand label. *See, e.g.*, Priest v. American Smelting & Ref. Co., 409 F.2d 1229, 1234 (9th Cir. 1969) (invoking "the rule that on questions of state law the determinations of a [federal] district court sitting in that state are entitled to great weight").

5. Appendix I is a circuit-by-circuit review of the rule of deference. Appendix II discusses the exceptions to the rule.

6. 304 U.S. 64 (1938).

law rulings in federal court. Section V observes that there may be unspoken—and unacceptable—reasons why judges have retained the rule.

A conflict among the circuits now exists on whether there should be any rule of deference.[7] Another intercircuit conflict exists about how much deference the court should afford if the rule applies.[8] *Intra*circuit disagreements concerning the rule of deference also have emerged.[9] Most significantly, in almost every circuit, different panels have articulated different formulations of the measure of deference applicable under the rule.[10]

In this setting, circuit court reevaluation of the rule is both desirable and predictable.[11] Supreme Court consideration also may wait in the wings.[12] The thesis of this Article is that the

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7. *Compare, e.g., In re* McLinn, 739 F.2d 1395, 1403 (9th Cir. 1984) (en banc) (holding that circuit no longer will afford deference to district court rulings on state law issues) *with* Rush Presbyterian St. Luke's Medical Center v. Safeco Ins. Co. of Am., 825 F.2d 1204, 1206 (7th Cir. 1987) (stating that circuit will give substantial weight to district court's determination of state law issue); *see generally infra* notes 14-18 and accompanying text.

8. *Compare, e.g.*, Beard v. J.I. Case Co., 823 F.2d 1095, 1098 n.3 (7th Cir. 1987) (affording "great weight" to district court ruling on state law, but refusing to apply "clearly erroneous review") *with* King v. Horizon Corp., 701 F.2d 1313, 1315 (10th Cir. 1983) (stating that state law ruling should be upheld unless "clearly erroneous"); *see generally infra* notes 19-28 and accompanying text.

9. For example, an intracircuit conflict arguably exists in the Third Circuit concerning whether any deference is due district court state law rulings. *Compare* William B. Tanner Co. v. WIOO, Inc., 528 F.2d 262, 266 (3d Cir. 1975) (stating that court may exercise "independent review" of federal trial judge's determination of mixed state law-fact issue) *with* Edwards v. Born, Inc., 792 F.2d 387, 390 (3d Cir. 1986) (stating that "the rule [is] that a district court's determination of local law is entitled to a measure of deference").

10. *See* Carter v. City of Salina, 773 F.2d 251, 256 (10th Cir. 1985) (Seymour, J., concurring); *see also infra* text accompanying notes 352-62 (Second Circuit); 395-98 (Fourth Circuit); 420-34 (Fifth Circuit); 486-93 (Sixth Circuit); 524-32 (Seventh Circuit); 608-19 (Eighth Circuit); 676-96 (Tenth Circuit); 744-45 (Eleventh Circuit).

11. *See, e.g., Carter*, 773 F.2d at 256-57 (Seymour, J., concurring) (criticizing Tenth Circuit's rule of deference and implying that en banc consideration of new standard is warranted); *see also* Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEX. L. REV. 157, 158 (1985) (stating that circuit courts may be rethinking various standards of review).

12. *See* SUP. CT. R. 17.1(a) (citing circuit court conflict as factor Court considers in deciding whether to grant certiorari); R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE § 4.4, at 197 (6th ed. 1986) (stating that Supreme Court usually grants certiorari when circuit courts are in direct conflict on same issue of federal law). The Court denied review, however, in *Olympic Sport Prods., Inc. v. Universal Athletic Sales Co.*, 760 F.2d 910 (9th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986), a case in which one question purportedly presented was whether the Ninth Circuit's de novo review standard

federal courts should abandon the rule of deference. The discussion that follows seeks to show why.

I. THE RULE AND ITS RATIONALE

A. THE REACH OF THE RULE OF DEFERENCE

In most cases, circuit court review of state law issues differs from circuit court review of federal law issues.[13] This is so because almost every circuit has held that appeals panels should afford heightened deference, not applicable in federal law cases, to the state law rulings of district court judges.[14] This practice is important because it touches a large portion of all civil appeals[15] and alters results in real cases for real peo-

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conflicted with other circuits' standards of review. 54 U.S.L.W. 3438 (U.S. Jan. 7, 1986) (No. 85-832). The Court also refused to review *Vanterpool v. Hess Oil V. I. Corp.*, 766 F.2d 117 (3d Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986), in which review was sought as to what standard of review should apply to district court determinations of territorial law. 54 U.S.L.W. 3403 (U.S. Dec. 10, 1985) (No. 85-812). To date, the Court may have been willing to tolerate intercircuit conflict in this area on the ground that the rule of deference relates to the internal workings of each court of appeals in much the same manner as do each circuit's procedural rules. This view, however, overlooks the fact that circuit court rulings on these issues go well beyond procedural niceties; in fact, different approaches to the rule of deference create far more meaningful appellate review in some circuits than in others. Such recurring and basic discrimination among litigants in the federal judicial system would seem to demand review by the high court. *See, e.g.*, Masri v. United States, 434 U.S. 907, 908 (1977) (White, J., dissenting from denial of certiorari) (advocating Supreme Court resolution of conflicts "where a defendant's rights would be notably different depending upon the [c]ircuit in which he is tried").

13. *See* Chula Vista City School Dist. v. Bennett, 824 F.2d 1573, 1579 (Fed. Cir. 1987), *cert. denied*, 108 S. Ct. 774 (1988) (stating that on question of *federal* law "the appellate court independently determines the proper interpretation and need not defer to the district court").

14. *See generally infra* Appendix I (reviewing more than 550 circuit court cases that cite rule of deference); 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4507, at 107 n.59 (1982) (reviewing Supreme Court and circuit court decisions on deference); 1A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 0.309[2], at 3127-39 n.28 (reviewing circuit court treatment of deference issue).

15. The rule applies to virtually all federal diversity cases, which constituted about 20-25% of the district courts' civil dockets during the last decade. *See* STATISTICAL ANALYSIS AND REPORTS DIVISION, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS A-6 (1985); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 12 (1986); Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 772 & n.14 (1983) (stating that in 1982 about one-quarter of new federal civil cases were diversity cases); *cf.* J. HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM 35 (1981) (stating that "[o]f the four main sources of civil litigation in federal courts—U.S. plaintiff, U.S. defendant, federal questions and

ple.[16] All but two circuits have endorsed the rule of deference.[17] Courts have applied the rule in hundreds of decisions.[18]

Appendix I to this Article provides a circuit-by-circuit treatment of the rule of deference. As that Appendix shows, different courts have articulated different versions of the rule.[19] Most circuit court panels give "great weight,"[20] "sub-

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diversity jurisdiction—appellate demand was as great or greatest in diversity [cases]"). Moreover, "state law is frequently quite relevant though the basis of the jurisdiction is something other than diversity." C. WRIGHT, THE LAW OF FEDERAL COURTS § 60, at 396 (4th ed. 1983); *see also* Note, *Unclear State Law in the Federal Courts: Appellate Deference or Review?*, 48 MINN. L. REV. 747, 748 & n.5 (1964) (stating that federal courts can apply state law in nondiversity cases).

16. In a number of cases, panels have stated or strongly suggested that the rule of deference may affect results. *E.g.*, Monte Carlo Shirt, Inc. v. Daewoo Int'l (Am.) Corp., 707 F.2d 1054, 1056-57 (9th Cir. 1983); Smith v. Sturm, Ruger & Co., 524 F.2d 776, 778 (9th Cir. 1975); Dierks Lumber & Coal Co. v. Barnett, 221 F.2d 695, 697 (8th Cir. 1955); Buder v. Becker, 185 F.2d 311, 315 (8th Cir. 1950); *see In re* McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc) (indicating that panel viewed rule of deference as determinative); *see also* Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278, 282 (2d Cir. 1981) (overturning district court's judgment as result of deference to another circuit court's interpretation of state law), *cert. denied*, 456 U.S. 927 (1982). In many cases, moreover, courts have stated that the rule of deference requires affirmance of a state law ruling, even though the appeals court may disagree with the substance of the ruling. *E.g.* Rudd-Melikian, Inc. v. Merritt, 282 F.2d 924, 929 (6th Cir. 1960).

As Professor Wright observed in a related setting: "A cynic might say this is a tempest about mere words. . . . But I think we can safely assume that appellate judges do make a conscientious attempt to confine their review to that authorized by law . . . ." Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 770 (1957).

17. *See infra* Appendix I. The rule of deference has little or no significance in the Court of Appeals for the Federal Circuit and has not yet been considered in that circuit because the circuit rarely reviews state law questions. Note, *supra* note 11, at 158 n.10. Among other courts of appeals, only the Ninth Circuit has rejected the rule. *See In re* McLinn, 739 F.2d 1395, 1403 (9th Cir. 1984) (en banc).

18. The dissenting opinion in *In re McLinn*, in an appendix, cited 79 cases decided outside the Ninth Circuit between 1977 and 1983 that endorsed the rule of deference. 739 F.2d at 1407-12 (Schroeder, J., dissenting). The cases were taken from WEST'S FEDERAL PRACTICE DIGEST 2D, Federal Courts Key Number 785 (1983 cum. pamphlet). *McLinn*, 739 F.2d at 1407. A more recent search, including years prior to 1977 and after 1983, revealed more than 550 reported decisions outside the Ninth Circuit stating some version of the rule of deference. *See infra* Appendix I, Introduction. In addition, the Ninth Circuit applied the rule in more than 115 cases before rejecting it in *McLinn*. *See infra* notes 649-54 and accompanying text.

19. Judge Seymour's concurring opinion in *Carter v. City of Salina*, 773 F.2d 251 (10th Cir. 1985), indicates the wide variation within the Tenth Circuit alone:

> In addition to the "clearly erroneous" standard, *see, e.g., King v. Horizon Corp.*, 701 F.2d 1313, 1315 (10th Cir. 1983), and the "clearly

stantial weight,"[21] "considerable weight,"[22] or "great"[23] or "substantial"[24] deference to district court rulings on state law. At least two circuits go further. The Tenth Circuit has held that such rulings carry "extraordinary force"[25] and should stand unless they are "clearly erroneous"[26] or "clearly wrong."[27] The Sixth Circuit has stated that it will not reverse "if a federal district court has reached a permissible conclusion upon a question of local law."[28]

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wrong" standard, *see, e.g., Mendoza v. K-Mart, Inc.*, 587 F.2d 1052, 1057 (10th Cir. 1978), this circuit has also accorded district court state law determinations "extraordinary force on appeal", *e.g., Campbell v. Joint District 28-J*, 704 F.2d 501, 504 (10th Cir. 1983), "extraordinary weight", *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807, 816 (10th Cir. 1977), "great weight", *e.g., Land v. Roper Corp.*, 531 F.2d 445, 448 (10th Cir. 1976), "substantial weight", *e.g., Glenn Justice Mortgage Co. v. First National Bank*, 592 F.2d 567, 571 (10th Cir. 1979), "great deference", *e.g., Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204 (10th Cir. 1977), "deference", *e.g., Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy District*, 739 F.2d 1472, 1477 (10th Cir. 1984), "some deference", *e.g., Colonial Park Country Club v. Joan of Arc*, 746 F.2d 1425, 1429 (10th Cir. 1984), "a degree of deference", *e.g., Obieli v. Campbell Soup Co.*, 623 F.2d 668, 670 (10th Cir. 1980), and "at least a modicum of deference", *Cedar v. Daniel International Corp.*, No. 82-2574, slip op. at 5 (10th Cir. April 26, 1983).

Carter, 773 F.2d at 257 (Seymour, J., concurring).

20. *E.g.*, Lomartira v. American Auto Ins. Co., 371 F.2d 550, 554 (2d Cir. 1967); *see infra* text accompanying notes 357, 420, 492, 524, 612, 689, 744.

21. *E.g.*, Rush Presbyterian St. Luke's Medical Center v. Safeco Ins. Co. of Am., 825 F.2d 1204, 1206 (7th Cir. 1987); *see infra* text accompanying notes 525, 614, 690.

22. *E.g.*, Hines v. Joy Mfg. Co., 850 F.2d 1146, 1150 (6th Cir. 1988); *see infra* text accompanying notes 425, 490.

23. *E.g.*, NCH Corp. v. Broyles, 749 F.2d 247, 253 n.10 (5th Cir. 1985); *see infra* text accompanying notes 423, 616, 688.

24. *E.g.*, Caspary v. Louisiana Land & Exploration Co., 707 F.2d 785, 788 n.5 (4th Cir. 1983); *see infra* text accompanying notes 392, 397, 491, 526, 615.

25. *E.g.*, Campbell v. Joint Dist. 28-J, 704 F.2d 501, 504 (10th Cir. 1983).

26. *E.g.*, King v. Horizon Corp., 701 F.2d 1313, 1315 (10th Cir. 1983).

27. *E.g.*, Mendoza v. K-Mart, Inc., 587 F.2d 1052, 1057 (10th Cir. 1978); *see infra* text accompanying notes 676-84.

28. *E.g.*, Rudd-Melikian, Inc. v. Merritt, 282 F.2d 924, 929 (6th Cir. 1960); *see infra* text accompanying notes 481-86. Other circuits on occasion also have used similarly sweeping expressions of the rule. *See, e.g.*, Lomartira v. American Auto Ins. Co., 371 F.2d 550, 554 (2d Cir. 1967). The Eighth Circuit often used both the "clearly erroneous" and "permissible inference" formulations before the court purported to abandon those approaches in *Luke v. American Family Mut. Ins. Co.*, 476 F.2d 1015, 1019 & n.6 (8th Cir.) (en banc), *cert. denied*, 414 U.S. 856 (1973). Even after *Luke*, the Eighth Circuit handed down at least three rule of deference decisions using the "clearly erroneous" rubric. *See infra* notes 594, 610 and accompanying text.

The Ninth Circuit also consistently employed a "clearly erroneous" or "clearly wrong" standard of review before abandoning the rule of deference in

The rule of deference, however it is formulated, applies in appeals arising in every procedural posture. Appellate courts have invoked the rule in reviewing rulings on motions to dismiss, conclusions of law made after nonjury trials, summary judgments, directed verdicts, actions on requests for jury instructions, and evidentiary rulings.[29] Courts even have cited the rule when the district court has not considered the relevant state law issue, to support remanding the case rather than addressing the state law question initially on appeal.[30] Courts have applied the rule of deference in cases concerning contract, tort, property, corporations, estates, trusts, banking, insurance, conflicts, debtor-creditor, res judicata, limitations, and commercial law,[31] as well as in the "area of intermingled state and federal law."[32] Courts have invoked the rule in cases of both wide and narrow significance.[33] In short, the rule is potentially relevant—both by its terms and in application—in resolving any and all questions of state law.[34]

B. THE ROOTS AND RATIONALE OF THE RULE

Adoption of the rule of circuit court deference came close on the heels of the Supreme Court's decision in *Erie R.R. Co. v. Tompkins*.[35] The Supreme Court decided *Erie* in 1938; by 1943, the Eighth Circuit had embraced the rule of deference.[36] That court based its adoption of the rule on an earlier Supreme Court reference to the expertise of district courts as finders of local law.[37] Other circuits later held that they too should defer

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In re McLinn, 739 F.2d 1395, 1403 (9th Cir. 1984) (en banc). *See infra* notes 649-50 and accompanying text; *see also infra* notes 434, 537 and accompanying text (discussing treatment of "clearly wrong" and "clearly erroneous" standard of review in Fifth and Seventh Circuits).

29. *See infra* text accompanying notes 546-50.

30. *See, e.g.*, Glenn v. State Farm Mut. Auto Ins. Co., 341 F.2d 5, 9 (10th Cir. 1965).

31. *See, e.g.*, notes 332-36, 403-10, 439-63, 498-507, 570-86, 705-24 and accompanying text.

32. Graffals Gonzalez v. Garcia Santiago, 550 F.2d 687, 688 (1st Cir. 1977).

33. *See, e.g., infra* notes 439-40, 724.

34. *Cf.* Beard v. J. I. Case Co., 823 F.2d 1095, 1097-98 (7th Cir. 1987) (stating that rule of deference applies to choice of law questions).

35. 304 U.S. 64 (1938); *see* Woodhull v. Minot Clinic, 259 F.2d 676, 678 (8th Cir. 1958) (stating that rule of deference reflects court practice "ever since [*Erie*]").

36. *See* Magill v. Travelers Ins. Co., 133 F.2d 709, 713 (8th Cir.), *cert. denied*, 319 U.S. 773 (1943).

37. *Id.* at 713 (citing Reitz v. Mealey, 314 U.S. 33, 39 (1941)).

to state law rulings made by district courts.[38]

No circuit court decision applying the rule of deference has supplied a detailed justification for it.[39] Those decisions which consider at all the rationale supporting the rule say only that it rests on the expertise of district court judges. It is the duty of the federal court in a state law case "to choose the rule that it believes the state court . . . is likely in the future to adopt."[40] District court judges, it is said, have special competence to tackle this task because they are "familiar with the intricacies and trends of local law and practice."[41] As a result, appellate judges, who often have practiced in other states and whose judicial work extends to multiple jurisdictions, should trust the judgments of district court judges concerning their own state's law.[42]

Building on this "expertise" rationale, appellate court panels have suggested that in some cases the rule of deference

38. *See generally* Note, *supra* note 15 (stating that many other circuits adopted Eighth Circuit position).

39. The most significant effort to justify the rule appears to be the dissenting opinion in *In re McLinn*, 739 F.2d 1395, 1403-12 (9th Cir. 1984) (en banc) (Schroeder, J., dissenting).

40. C. WRIGHT, *supra* note 15, § 58, at 375; *see* Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967); Bernhardt v. Polygraphic Co., 350 U.S. 198, 209 & n.3 (1956) (Frankfurter, J., concurring); *see also* Cooper v. American Airlines, 149 F.2d 355, 359 (2d Cir. 1945) (defining question as: "What would be the decision of reasonable intelligent lawyers, sitting as judges of the highest [state] court, and fully conversant with [that state's] 'jurisprudence'?").

41. Cranford v. Farnsworth & Chambers Co., 261 F.2d 8, 10 (10th Cir. 1958) (quoting Huddleston v. Dwyer, 322 U.S. 232, 237 (1944)); *accord* Black v. Fidelity & Guar. Ins. Underwriters, 582 F.2d 984, 987 (5th Cir. 1978).

42. *See* O'Toole v. New York Life Ins. Co., 671 F.2d 913, 914 (5th Cir. 1982) (affording deference because district court judge is "schooled and skilled in the law of her state"); Ferran v. Illinois Cent. R.R., 293 F.2d 487, 489 (5th Cir. 1961) (citing district court judge's "long experience" with state law), *cert. denied*, 368 U.S. 994 (1962); California v. United States, 235 F.2d 647, 654 (9th Cir. 1956) (affording deference because district judge was "acquainted with the imponderables and implications inherent in the pronouncement of the courts of the state"); *infra* notes 331, 401, 418, 497, 540-43, 587-90, 697-98, 743 and accompanying text; *see generally* C. WRIGHT, *supra* note 15, § 58, at 375. Professor Wright states:

> As a general proposition, a federal court judge who sits in a particular state and has practiced before its courts may be better able to resolve complex questions about the law of that state than is some other federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts have frequently voiced reluctance to substitute their own view of the state law for that of the federal judge.

Id.

may be "especially" applicable,[43] Courts have made such comments, for example, when the district court judge formerly sat on a state court,[44] when a case involves an area of law in which the district court judge had "long experience" as a practitioner,[45] and even when the distict court judge has been a longstanding member of the state bar.[46] The rule of deference also may carry greater force in cases involving the special complexities of territorial law[47] or of Louisiana civil law.[48] In addition, courts have found the rule particularly applicable when two or more district court judges have reached the same conclusion as to the state law issue before the court.[49]

In other cases, circuit courts have found the rule of deference especially applicable on grounds unrelated to district court expertise. One court, for example, deemed the rule "particularly" relevant in reviewing a trial judge's reading of a state statute "pertaining to such local matters as guard rails on bridges and traffic control signals."[50] Other courts have found deference "particularly appropriate where . . . the [state] intermediate appellate courts are divided"[51] or when a state "statutory scheme is less than clear and capable of varying interpretation."[52] In a few cases, courts applying the rule have emphasized that the appellant voluntarily declined to institute the action in state court.[53]

These cases which find the rule of deference "especially"

43. *E.g.*, Toro Co. v. Krouse, Kern & Co., 827 F.2d 155, 160 (7th Cir. 1987).

44. *See, e.g.*, Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988); *see infra* text accompanying notes 520-23, 552, 626, 699, 752.

45. Goldstick v. ICM Realty, 788 F.2d 456, 466 (7th Cir. 1986).

46. *See, e.g.*, Filley v. Kickoff Publishing Co., 454 F.2d 1288, 1291 (6th Cir. 1972).

47. *See* Gual Morales v. Hernandez Vega, 604 F.2d 730, 732 (1st Cir. 1979); *infra* notes 324, 662-68 and accompanying text. *But see* Saludes v. Ramos, 744 F.2d 992, 994 (3d Cir. 1984); *infra* notes 388-89 and accompanying text (discussing Third Circuit rule).

48. *See* Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300, 304 (5th Cir. 1982); *infra* text accompanying notes 436-37.

49. *See* Watson v. Callon Petroleum Co., 632 F.2d 646, 648 (5th Cir. 1980); *infra* text accompanying note 435.

50. Aubertin v. Board of County Comm'rs, 588 F.2d 781, 785 (10th Cir. 1978) (citation omitted); *see infra* note 551.

51. Enis v. Continental Ill. Nat'l Bank & Trust Co., 795 F.2d 39, 40 (7th Cir. 1986).

52. Golden v. Cox Furniture Mfg. Co., 683 F.2d 115, 118 (5th Cir. 1982) (footnote omitted).

53. *See* Citizens Ins. Co. v. Foxbilt, Inc., 226 F.2d 641, 643 (8th Cir. 1955); Diercks Lumber & Coal Co. v. Barnett, 221 F.2d 695, 697 (8th Cir. 1955); *infra* text accompanying notes 631-32, 703.

significant are problematic, particularly insofar as they invite heightened deference without connecting that result to the rule's "expertise" rationale. As this Article seeks to demonstrate, good reason exists to reject the rule of deference altogether. Courts therefore should hesitate in any case to find that the rule operates with "special" or "particular" force.

C. LIMITS ON THE RULE OF DEFERENCE

Notwithstanding widespread recognition of the rule of deference, courts have not applied it in monolithic fashion. In fact, many appellate decisions on state law issues do not cite the rule at all,[54] and some circuits invoke the rule only rarely.[55]

In addition, the manner in which some courts have expressed the rule suggests that the rule has important limits. In a number of cases, for example, courts have indicated that they will defer to the state law findings of an "able" or "experienced" trial judge.[56] These formulations imply that those courts will *not* defer to judges perceived to be unable or inexperienced. No appeals court, however, has expressly declined to defer to a district court's rulings on these grounds. Moreover, the vast majority of cases state the rule of deference without qualification, thus suggesting it applies to the decision of any district judge.[57]

Even while broadly stating the rule, courts have recognized exceptions to it. Thus, some courts have declined to apply the rule when the district court's conclusion seems suspect. Appeals courts may not defer, for instance, when a significant change in state law follows the district court ruling[58] or when

54. This fact is made clear by a comparison of cases in which circuit courts *do* apply the rule of deference. For example, the Eighth Circuit applied the rule of deference in more than 96 cases from 1980 through June 1988, including more than 30 cases decided in 1987 and the first half of 1988 alone. *See infra* notes 610-23. Comparable figures from other circuits suggest that those courts cite the rule *far* less often. *See infra* Appendix I. This discrepancy is telling because all these circuits, except the D.C. Circuit and First Circuit, have had dockets heavier than or comparable to the Eighth Circuit's docket during the relevant time frames. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS Table B-1 (1981-85).

55. *See infra* notes 353 (2d Cir.), 370-91 (3d Cir.), and 392-415 (4th Cir.).

56. *E.g.*, Savings & Loan Co. v. Wood, 323 F.2d 322, 328 (8th Cir. 1963); Anthony v. Louisiana & Ark. Ry., 316 F.2d 858, 863 (8th Cir.) (per curiam), *cert. denied*, 375 U.S. 830 (1963).

57. *See infra* notes 326-28, 357, 384, 392, 420, 482, 535, 608, 680, 741 and accompanying text.

58. *See infra* notes 563, 676 and accompanying text.

the district court ruling appears in dictum,[59] in a hurried decision,[60] or in an opinion lacking meaningful reasoning.[61] One circuit court panel did not apply the rule when different district court judges had disagreed on the proper answer to the legal questions presented,[62] and another deemed the rule without effect when an "in state" panel member rejected the district court judge's view of state law.[63] Courts also have declined to apply the rule when the expertise rationale of the rule appears lacking—as when the district court judge did not apply his or her own state's law[64] or merely applied a general rule.[65] Finally, one court mitigated the rule's effect on the theory that the district court judge signaled his own uncertainty on the legal issue by certifying an interlocutory appeal.[66] Because this Article focuses on the wisdom of the rule of deference, not the appropriateness of its exceptions, futher treatment of these exceptions is deferred to Appendix II. Two points about them nonetheless merit emphasis. First, these exceptions surface in a sporadic fashion and not all of them are followed in every court. Second, the growing number and scope of suggested exceptions to the rule plausibly may reflect a rising judicial hostility toward the rule itself.

Apart from recognizing exceptions to the rule of deference, courts also occasionally downplay the rule's significance even while embracing it. Courts citing the rule, for example, have stated that an appellant is "entitled to review of the trial court's determination of state law just as . . . of any other legal question,"[67] or that the court may affirm a state law ruling "only if . . . convinced that it is right."[68] Vague and occasional de-emphasis of the rule, however, cannot undo its repeated recitation and application in hundreds of appellate court decisions. Judged by the entire body of opinions that discuss the proper level of appellate scrutiny of state law rulings, the rule of deference stands in virtually every circuit as a settled and sturdy principle of law.

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59. *See infra* notes 565, 734 and accompanying text.
60. *See infra* notes 733, 773 and accompanying text.
61. *See infra* note 775 and accompanying text.
62. *See infra* note 763 and accompanying text.
63. *See infra* notes 764-66 and accompanying text.
64. *See infra* notes 757-58 and accompanying text. *But see infra* note 760.
65. *See infra* notes 768-70 and accompanying text.
66. *See infra* note 771 and accompanying text.
67. Roberts v. Berry, 541 F.2d 607, 609 (6th Cir. 1976) (quoting Randolph v. New England Mut. Life Ins. Co., 526 F.2d 1383, 1385 (6th Cir. 1975)).
68. Estate of Darby v. Wiseman, 323 F.2d 792, 796 (10th Cir. 1963).

II. JUSTIFYING—AND UNJUSTIFYING— THE RULE OF DEFERENCE

The rule of deference has few detractors. Few judges have criticized the rule.[69] Scholarly commentary, although sparse, seems on balance to support the rule.[70] In 1984, however, the Court of Appeals for the Ninth Circuit, sitting en banc, rejected the rule of deference in the watershed case, *In re McLinn*.[71] The opinion in *McLinn* marshalls arguments of policy and authority against the rule in a well-crafted, lengthy, and thoughtful discussion.[72] Even so, the *McLinn* opinion leaves much unsaid.

This section of this Article seeks to go beyond the court's

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69. *Cf. In re* McLinn, 739 F.2d 1395, 1403 (9th Cir. 1984) (en banc) (Schroeder, J., dissenting) (stating that rule of deference is followed in all other circuits).

70. *See* Woods, *The* Erie *Enigma: Appellate Review of Conclusions of Law*, 26 ARIZ. L. REV. 755, 755 (1984); Note, *supra* note 11, at 192; *see also* C. WYZANSKI, A TRIAL JUDGE'S FREEDOM & RESPONSIBILITY 23 (1952) (noting rule); Comment, *Deference to Federal Circuit Court Interpretations of Unsettled State Law:* Factors, Etc., Inc. v. Pro Arts, Inc., 1982 DUKE L.J. 704, 710-11 (1982) (stating that rule of deference is based on sound rationale that district courts have more experience in state law matters). *But see* Note, *supra* note 15, at 760-61 (arguing that rule of deference should be applied only at Supreme Court level); Note, *What is the Proper Standard for Reviewing a District Court's Interpretation of State Substantive Law*, 54 U. CIN. L. REV. 215, 229-30 (1985) (arguing for de novo review); Note, *A Nondeferential Standard for Appellate Review of State Law Decisions by Federal District Courts*, 42 WASH. & LEE L. REV. 1311, 1322-23 (1985) (arguing that right of appeal requires appellate court review of district court state law findings). Professors Wright, Miller, and Cooper appear to endorse some version of the rule of deference. 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 14, § 4507, at 109-10. They write that "although the considered decision of a district judge experienced in the law of a state naturally commands the respect of an appellate court, a party is entitled to meaningful review of that decision just as he is of any other legal question in the case, and just as he would have been if the case had been tried in a state court." *Id.*; *accord* C. WRIGHT, *supra* note 15, § 58, at 376. They also find "defensible," however, the "frequently . . . voiced reluctance" of federal appeals courts "to substitute their own view of the state law for that of the district judge." 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 14, § 4507, at 106-07; *accord* C. WRIGHT, *supra* note 15, § 58, at 375. Professors Wright, Miller, and Cooper identify *Luke v. American Family Mut. Ins. Co.*, 476 F.2d 1015, 1019-20 & n.6 (8th Cir. 1972), *aff'd on rehearing en banc*, 476 F.2d 1023 (8th Cir.), *cert. denied*, 414 U.S. 856 (1973), as in accord with their view. 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 14, § 4507, at 109 n.60. In *Luke*, the court afforded "great weight" to the district court determinations on state law, but rejected the "clearly erroneous" standard of review. *Luke*, 476 F.2d at 1019 n.6.

71. 739 F.2d 1395 (9th Cir. 1984) (en banc) (6-5 decision).

72. *McLinn*, 739 F.2d at 1399-1403; *see infra* notes 199-201 and accompanying text.

analysis in *McLinn* by attacking the rule of deference in a more detailed and systematic way. The section first demonstrates that the "rule" of deference is, in fact, the exception to the rule, because it reflects a dramatic departure from traditional appellate court practice.[73] It then rejects authority-based arguments that seek to rest the rule on Supreme Court pronouncements or the *Federal Rules of Civil Procedure*.[74] Finally, this section urges that the rule's stated rationale of district court "expertise" in finding state law fails to withstand careful scrutiny.[75] In short, this section argues that the rule of deference is solely a *common-law* concoction of the courts of appeals, and that it is an *unjustified* common-law rule because it lacks a sound foundation.

A. THE RULE OF DEFERENCE AS THE EXCEPTION TO THE RULE

Any look at the rule of deference must begin with basics. It is generally accepted that "[t]he right of appeal, while never held to be within the Due Process guaranty of the United States Constitution, is a fundamental element of procedural fairness . . . in this country."[76] It is also accepted that the central task of an appellate court is "to decide questions of law."[77]

In the paradigm of appellate review, the court identifies de

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73. *See infra* notes 76-86 and accompanying text.

74. *See infra* notes 90-124 and accompanying text.

75. *See infra* notes 125-97 and accompanying text.

76. STANDARDS RELATING TO APPELLATE COURTS § 3.10 commentary, at 14 (1977); *see also* Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459, 463 (1975) (noting that right to at least one appeal is "firmly rooted"); Hopkins, *The Winds of Change: New Styles in the Appellate Process*, 3 HOFSTRA L. REV. 648, 648 (1975) (stating right to appeal is "the modern view—buttressed by statutes in both the federal and state systems"); Rubin, *Views from the Lower Court*, 23 UCLA L. REV. 448, 459 (1976) (citing "the tradition of 'one appeal as of right' ").

77. Reay v. Butler, 95 Cal. 206, 214, 30 P. 208, 209 (1892); *see* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984); *see also* Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 855 n.15 (1982) (stating appellate court can correct errors of law); Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982) (asserting that "if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis"); United States v. Singer Mfg. Co., 374 U.S. 174, 194 n.9 (1963) (stating appellate court can correct errors of law); Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 329 (1796) (stating that facts are determined by court below and law is determined by Supreme Court); Tupman v. Haberkern, 208 Cal. 256, 264, 280 P. 970, 973 (1929) (stating that trial court decides questions of fact and appeals court decides questions of law); STANDARDS RELATING TO APPELLATE COURTS § 3.11 commentary, at 21-22; Wright, *supra* note 16, at 766 (noting the "feeling that the primary function of appellate courts is to find and declare the law") (citing R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 300-01 (1941)).

novo the command of the controlling statute or principle of common law.[78] If the appeals court's conclusion differs from that of the trial court, then there is error.[79] This accepted approach to the appellate process apparently rests on a shared understanding that law exists,[80] that the "duty" of judges is "to say what the law is,"[81] and that doctrinal coherence and fairness for similarly situated litigants demands consistent application of legal rules.[82] The rule of de novo review, whatever its

78. *Bose*, 466 U.S. at 505; United States v. Mississippi Valley Generating Co., 364 U.S. 520, 526 (1961); United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984); *see also* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 13.4, at 600 (1985) (stating that appellate court decides questions of law "de novo"); Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1153 (1987) (discussing appellate review of facts and law); Leavell, *Changing Standards of Appellate Review*, WIS. B. BULL., May 1987, at 25, 25 (stating that "appellate court may substitute its judgment for that of the trial court on conclusions of law"); Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, The Judge/Jury Question and Procedural Discretion*, 64 N.C.L. REV. 993, 993 (1986) (stating that questions of law "ordinarily are reviewed freely or independently on appeal"); Stern, *Review of Findings of Administrators, Judges & Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 72 n.7 (1944) (stating that "business of the appellate court is to make up its own mind on questions of law appealed to it"); Wright, *The Federal Courts—a Century after Appomattox*, 52 A.B.A. J. 742, 748 (1966) (suggesting, as part of discussion of federal court reform, that "questions of law [are] decided anew by the appellate judges").

79. *See* Herb v. Pitcairn, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments"); Eliason v. Henshaw, 17 U.S. (4 Wheat.) 225, 228 (1819) (stating that trial court's failure to give jury instruction may be reversible as matter of law); W. REHNQUIST, THE SUPREME COURT, HOW IT WAS, HOW IT IS 267 (1987) (stating that appellate courts undertake to "make sure . . . that the [trial] judge correctly applied the law"); Hopkins, *supra* note 76, at 459 (stating that appellate court's role is reviewing questions of law); Surrency, *The Development of the Appellate Function: The Pennsylvania Experience*, 20 AM. J. LEGAL HIST. 173, 173 (1976) (stating that appellate courts have "jurisdiction to correct errors of law" made by courts below).

80. *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (stating that the "government of the United States has been emphatically termed a government of laws, and not of men"); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-4, at 37 (2d ed. 1988) (stating that judges "must treat the law as determinate"); *Rubin*, *supra* note 76, at 452 (stating that "the foundation of our belief in the rule of law is the conviction that legal rules cannot only be formulated, but can also be stated and applied to govern human decisions").

81. *Marbury*, 5 U.S. (1 Cranch) at 177.

82. *Cf.* Guaranty Trust Co. v. York, 326 U.S. 99, 112 (1945) (stating that "operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law"); Local No. 6167, United Mine Workers v. Jewell Ridge Coal Corp., 4 Wage & Hour Cas. (BNA) 746, 747 (4th Cir. 1944) (holding that "where the facts of two cases are substantially the same, the law should not be applied differently because trial judges have looked at them in a differ-

source, runs deep in our history; independent appellate inquiry into questions of law has marked our republic's legal system from its earliest days.[83]

The rule of deference clashes with this historic approach to the appellate function. Under the rule, as stated by one court, "[a]n appellate court is not called upon to decide whether the Trial Court reached the *correct* conclusion of law, but only whether it reached a *permissible* conclusion."[84] Thus, courts recognize—as they must—that the rule produces different results from those that would be reached on traditional de novo review.[85] Confronted with this reality, six Ninth Circuit judges concluded that the rule of deference amounts to "an abdication of our appellate responsibility."[86]

To say that judges are "abdicating" their duties in applying the rule may be too harsh. The Ninth Circuit's observation underscores with accuracy, however, the broad breach of accepted decisional norms inherent in the rule of deference. As the Supreme Court has said in another context, "[o]ne would expect, upon an inquiry into the sources of the . . . rule, to find a clear and compelling justification for departure from the result dictated by elementary principles in the law."[87] Close analysis reveals, however, that the justifications for the rule of deference are not "clear and compelling"—or even persuasive at all.

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ent way"); P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 147 (1976) (identifying uniformity as "one of the imperatives of appellate justice"); L. TRIBE, *supra* note 80, § 3-4, at 37 (stating that "adjudicatory process must yield but a single result in any single case"); Carrington, *The Power of District Judges & the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 517-18 (1969) (stating that appellate process is adequate if reviewing court finds lower court decision "is consistent with a valid and applicable general principle of law"); Vestal, *Reported Opinions of the Federal District Courts: Analysis and Suggestions*, 52 IOWA L. REV. 379, 384 (1966) (noting "basic fairness in treating similar litigants similarly").

83. *See* Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 410 (1821); Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321, 329-30 (1796); Wright, *supra* note 16, at 779 (noting that "[f]rom the earliest times appellate courts have been empowered to reverse for errors of law, to announce the rules which are to be applied, and to ensure uniformity in the rules applied by various inferior tribunals"). Some commentators have suggested that this de novo model of appellate review is an oversimplification. Clermont, *supra* note 78, at 1131 & n.71. Even if these observations are correct, *but see* note 79, they do not alter the fact that deferential review in state law cases departs markedly from traditional practice.

84. United States v. Hunt, 513 F.2d 129, 136 (10th Cir. 1975) (emphasis added).

85. *See supra* note 16.

86. *In re* McLinn, 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc).

87. Moragne v. States Marine Lines, 398 U.S. 375, 381 (1970).

B. The Rule of Deference and the Authorities

Whether sound or not, the rule of deference must stand if controlling law mandates its observance. Commentators have suggested that such a mandate may lie in either of two separate sources: Supreme Court case law[88] or Rule 52 of the *Federal Rules of Civil Procedure*.[89] Neither view is sound.

1. Distinguishing Supreme Court and Circuit Court Deference

In *Railroad Commission v. Pullman Co.*,[90] the Supreme Court confronted a case in which a three-judge district court had interpreted Texas law. The Court skirted the state law issue by ruling that the district court should have abstained from resolving that issue pending consideration of it by the Texas state courts.[91] En route to this holding, however, the high court issued an influential dictum:

> [The lower court's decision] represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, *we should hesitate long before rejecting their forecast of Texas law*.[92]

The Court in *Reitz v. Mealey*[93] again confronted a state law issue addressed by a three-judge district court. In affirming that state court's decision, the Supreme Court observed once again that "we should accord great weight to the District Court's view of [state] law."[94] In more recent cases, the Supreme Court has followed the same logic in deferring to district court rulings on state law issues affirmed by three-judge circuit court panels.[95]

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88. *See infra* notes 90-105 and accompanying text.
89. *See infra* notes 106-24 and accompanying text.
90. 312 U.S. 496 (1941).
91. *Id.* at 499-500.
92. *Id.* at 499 (emphasis added).
93. 314 U.S. 33 (1941).
94. *Id.* at 39.
95. *See* Bishop v. Wood, 426 U.S. 341, 345-46 & n.10 (1976) (collecting earlier authorities); Steele v. General Mills, Inc., 329 U.S. 433, 438-39 (1947) (refusing to reverse district and appellate court application of state law); Township of Hillsborough v. Cromwell, 326 U.S. 620, 630 (1946) (finding no error in district and circuit court ruling on state law); MacGregor v. State Mut. Life Assurance Co., 315 U.S. 280, 281 (1942) (per curiam) (leaving "undisturbed the interpretation placed upon purely local law by a . . . federal judge of long experience and by three circuit judges").

A related case is *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204-05 (1956), in which the Court gave "special weight" to an interpretation of Vermont law made by the district judge, although the state law ruling was not

Almost every court of appeals has suggested that these Supreme Court pronouncements support the rule of deference.[96] Indeed, the Eighth Circuit, in first adopting the rule, relied squarely on the Supreme Court's decision in *Reitz*.[97] The rule of circuit court deference, however, does not follow from the Supreme Court's practice of accepting lower court rulings on state law.[98] It is one thing for the Supreme Court, in addressing the handful of state law issues it comes upon, to defer to determinations made by three-judge courts or district court rulings that have been affirmed on appeal. It is quite another for the thirteen federal circuit courts to defer in hundreds of state law cases to the unreviewed rulings of a single judge. Resting the rule on Supreme Court practice also ignores the radically different roles played by the Supreme Court and the circuit courts in the federal judicial system. The circuit courts are courts of appeal in the traditional sense, whose central purpose is "error correction."[99] In contrast, the Supreme Court carries out the specialized function of providing the last word on *important* issues of *national* law.[100] Because of this unique

considered by the court of appeals, which rested its decision on an alternative analysis not affected by the state law issue. *See id.* at 207 (Frankfurter, J., concurring). The Court went on to observe, however, that "[w]ere the question in doubt or deserving further canvass, we would of course remand to the Court of Appeals to pass on this question of Vermont law." *Id.* at 205. *Bernhardt* thus does not support the rule of circuit court deference to district court rulings on state law. The case dealt solely with a Supreme Court decision to exercise its discretion to dispose of a state law issue rather than return the case to the circuit court for further appellate proceedings, engendering attendant delay. Such a determination—and reliance on district court expertise in making it—does not logically require circuit court deference in cases already lodged in the courts of appeals. Indeed, the Court's specific endorsement of remand to the circuit court to pass on state law issues whenever they are in doubt may cut against recognition of a general rule of circuit court deference.

96. *See supra* note 41; *infra* notes 329, 361, 544 and accompanying text.

97. *See* Magill v. Travelers Ins. Co., 133 F.2d 709, 713 (8th Cir.), *cert. denied*, 319 U.S. 773 (1943).

98. *See* 1A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 0.309[2], at 3127 n.28 (stating that Supreme Court practice "should in no way be construed as a limitation" on circuit court authority); Note, *supra* note 15, at 755-56 (same).

99. J. HOWARD, *supra* note 15, at 7-8, 76 (discussing error correction and stating that the "most basic" function of courts of appeals is *"error correction*—supervising the application and interpretation of national and state law in district courts and agencies and holding them to account") (emphasis in original).

100. *See* W. REHNQUIST, *supra* note 79, at 268-69; C. VINSON, WORK OF THE FEDERAL COURTS, 69 S. Ct. v, vi (address to American Bar Ass'n, Sept. 7, 1949); Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 407 (1972); *see also* J. HOWARD, *supra* note 15, at 5 (stating that courts of appeals "were designed to conserve the energies of the Supreme Court for its historic

mission, the Supreme Court always declines to review cases that present only state law issues.[101] Consistent adherence to the Court's special role as a national lawmaker explains the Court's refusal to second-guess those state law rulings dragged before it as the baggage of federal law disputes.[102]

The Supreme Court on occasion has adverted to the special competence of district court judges on matters of local law.[103] These comments, however, do not inform the issue at hand. It is understandable that in the eyes of a Court that virtually never sees state law issues, federal district courts do appear to possess expertise on matters of state law. That, however, is beside the point. For purposes of the rule of circuit court deference, the key questions are *how much* expertise district courts

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missions of umpiring intergovernmental disputes and determining legal issues of national significance").

101. Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) (per curiam). *See generally* R. STERN, E. GRESSMAN & S. SHAPIRO, *supra* note 12, §§ 3.25, 4.10. Stern and Gressman suggest that the Court sometimes has reviewed state law rulings of curcuit courts when such rulings involve "a conflict with, or a refusal to follow, a decision rendered by the highest court of the state." *Id.* § 4.10, at 210-11. Properly understood, however, these cases generated review only of *federal law* issues, *i.e.*, issues concerning the scope of duty of federal courts, as a matter of *federal* law under the *Erie* rule, to follow either state trial court or appellate court decisions interpreting state law. *See generally* C. WRIGHT, *supra* note 15, § 58 (discussing federal rules concerning determination of state law under *Erie*).

102. In a recent case, the Supreme Court referred to the rule of circuit court deference. In *United States v. Hohri*, 107 S. Ct. 2246 (1987), the issue was whether the Court of Appeals for the Federal Circuit, rather than the regional court of appeals, has jurisdiction over appeals presenting both Little Tucker Act claims and Federal Tort Claims Act claims. Little Tucker Act claims ordinarily are appealable only to the Federal Circuit, while Federal Tort Claims Act claims normally may be appealed only to the regional courts of appeals. After considering the legislative history of the two acts, the Court held that sole jurisdiction rested in the Federal Circuit. *Id.* at 2253. Justice Powell, in a footnote, stated:

> There may have been a concern that Federal Circuit judges would not be familiar with questions of state tort law. But this problem is mitigated considerably by the fact that these cases are tried before local Federal District judges, who are likely to be familiar with the applicable state law. Indeed, a district judge's determination of a state law question usually is reviewed with great deference. It is certainly not clear that a panel of the Federal Circuit would be less competent to review such determinations than a panel of a regional Court of Appeals.

Id. at 2253 n.6 (citations omitted). This brief footnote addressing a subsidiary point of legislative intent does not, of course, require circuit courts to adhere to the rule of deference. It merely notes that there is such a rule and vaguely suggests that the rule's existence may mean that Federal Circuit panels operate much like most regional appeals courts in addressing state law questions.

103. *E.g.*, *id.*

possess *in comparison to the circuit courts*, and *how significant* that difference is *in light of other considerations of policy*.[104] The Supreme Court has not uttered a word addressing these key questions. Indeed, Supreme Court authority stands as much against the rule of deference as for it, because several high court decisions suggest that appeals courts *should* review de novo the state law rulings of district court judges.[105] The rule of deference thus can gain no impetus from the pronouncements of the Supreme Court.

2. The Rule of Deference and Rule 52(a)

Rule 52(a) of the *Federal Rules of Civil Procedure* provides that "[f]indings of fact . . . shall not be set aside unless clearly erroneous."[106] Some circuit courts have used this "clearly erroneous" standard to define the degree of deference afforded to state law rulings, and at least one circuit—the Tenth—has cited Rule 52 in taking this approach.[107] The question thus arises whether circuit courts *must* apply "clearly erroneous" review because the term *findings of fact* as used in Rule 52 embraces rulings on the meaning of state law.

This proposed construction startles the intuitions. The very text of Rule 52 distinguishes "findings of fact" from "conclusions of law," and it would be strange to say that conclusions about the meaning of state law are not conclusions of law.[108] Leading commentators have concluded that state law rulings

104. *See infra* notes 125-97 and accompanying text.

105. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring) (stating "defendant is entitled to have the view of the Court of Appeals on Vermont law and cannot . . . be foreclosed by the District Court's interpretation"); King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 161-62 (1948) (recognizing propriety of circuit court's "mak[ing] its own determination of what the Supreme Court of South Carolina would probably rule in a similar case"); Huddleston v. Dwyer, 322 U.S. 232, 236 (1944) (stating that both federal appellate court and trial court must "ascertain and apply the state law"); *infra* note 199.

106. FED. R. CIV. P. 52(a).

107. *See infra* note 111 and accompanying text.

108. FED. R. CIV. P. 52(a) provides in pertinent part: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . ." *Id.*; *see also* Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982) (specifying that Rule 52(a) "does not apply to conclusions of law"); C. WRIGHT, *supra* note 15, § 58, at 376 (observing that "a party is entitled to review the trial court's determination of state law"); *see generally* Louis, *supra* note 78, at 994 n.3 (arguing that "[d]eclarations of law are fact-free general principles that are applicable to all, or at least to many, disputes and not simply to the one *sub judice*"); Stern, *supra* note 78, at 122 (noting that "[q]uestions as to what the evidence shows,

are not properly subject to "clearly erroneous" review,[109] and the large majority of circuits embracing the rule of deference agree.[110] Even the Tenth Circuit, which has adhered to clearly erroneous review, apparently has not felt that Rule 52 mandates that approach.[111]

The argument may be made that federal court decisions on state law are "findings of fact" because they entail *predicting* how in fact a state court would rule on the issue.[112] Characterizing this lawfinding task as predictive, however, does not make the inquiry factual.[113] One might well say, for example, that lower courts considering unresolved issues in federal law must

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whether directly or by inference, are factual [while] [q]uestions as to the nature of the general rule to be applied are legal").

109. *See* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 14, § 4507, at 109 (stating that "determination of state law . . . is a legal question"); 1A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 0.309[2], at 3128 n.28 (noting that some courts "erroneously" apply clearly erroneous standard).

110. *See infra* notes 361-62, 380-90, 434, 538-39, 608 and accompanying text.

111. Tenth Circuit use of Rule 52 illustrates this proposition. In *Carter v. City of Salina*, 773 F.2d 251 (10th Cir. 1985), the court stated: "The challenges posed on appeal relate to the district court's interpretation and/or application of controlling state law. *We have held that Fed.R.Civ.P. 52(a) applies under these circumstances.*" *Id.* at 254 (emphasis added). In the immediately preceding sentence, however, the court stated: "The trial court's findings of fact are not at issue." *Id.* Moreover, two of the cases cited in *Carter* as having "held" that Rule 52(a) "applies," *id.*, merely refer to the Rule while discussing state law issues. *See* Loveridge v. Dreagoux, 678 F.2d 870, 877 (10th Cir. 1982); United States v. Hunt, 513 F.2d 129, 136 (10th Cir. 1975). The earliest decision cited in *Carter* to support using the clearly erroneous standard does *not* cite Rule 52 at all. *See* Manufacturer's Nat'l Bank v. Hartmeister, 411 F.2d 173, 176 (10th Cir. 1969). In short, no decision indicates clearly that the Tenth Circuit has ever held that state law rulings are findings of fact necessarily subject to clearly erroneous review under Rule 52. *Compare* Stafos v. Jarvis, 477 F.2d 369, 372-73 (10th Cir.) (stating that "clearly erroneous rule does not apply on questions of law" and adding that "in our Circuit . . . the views of a Federal District Judge . . . carry extraordinary persuasive force" in state law cases), *cert. denied*, 414 U.S. 944 (1973) *and* Binkley v. Manufacturers Life Ins., 471 F.2d 889, 893 (10th Cir.) (Lewis, C.J., concurring) (stating that "surely 'clearly erroneous' [as used in defining proper measure of deference] should not be confused with the words of art contained in the context of Rule 52[a]"), *cert. denied*, 414 U.S. 877 (1973) *with* Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1332 (10th Cir. 1983) (vaguely citing Rule 52), *cert. denied*, 466 U.S. 958 (1984).

112. *See supra* note 40 and accompanying text.

113. The Third Circuit rejected this argument in an opinion by Chief Judge Seitz. Compagnie des Bauxites de Guinee v. Insurance Co. of N. Am., 724 F.2d 369, 371-72 (3d Cir. 1983) (Seitz, C.J., concurring) (distinguishing state court's holding from district court's "prediction," but finding "nothing in this difference that affects our standard of review").

predict how the Supreme Court would decide the issues.[114] To define the lawfinding function in this way, however, does not transform an issue of law into an issue of fact. Rather, the issue remains one of law precisely because it involves a prediction of proper *legal* doctrine.[115]

One commentator has cited the legislative history of Rule 52 to support the "issue of fact" characterization.[116] Clearly-erroneous review, he notes, applies not only to findings resolving credibility disputes, but also to credibility-free fact determinations based on documents or established subsidiary facts.[117] In redrafting Rule 52, the Advisory Committee justified this result by observing that "[t]o permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority."[118] These same "functional" considerations, the commentater argues, require characterizing state law rulings as "findings of fact" because state law rulings resemble credibility-free fact determinations.[119]

This argument is not persuasive because the case against "needlessly reallocat[ing] judicial authority" to make *fact* determinations simply does not carry over to decisions about state *law*. Courts of appeals, for example, have no special capacity to assess the factual import of documents received in evidence.[120]

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114. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 209 & n.3 (1956) (Frankfurter, J., concurring).

115. Difficult questions of statutory interpretation fit this mold as well. In those cases, surrogate judgment is also the question—predicting how the legislature would have decided the issue if the legislature had focused squarely upon it. *See, e.g.*, Alaska Airlines v. Brock, 107 S. Ct. 1476, 1480 (1987) (noting that court inquires, in determining severability of unconstitutional provision, whether Congress would have enacted statute without offensive provision). Courts readily could characterize this issue as "factual" because it focuses on the traditionally factual issue of intent. Yet such inquiries entail legal determinations because, as with state law issues, they involve discerning principles that are based on far more than the trial evidence and that have relevance beyond the immediate dispute. *See* Stern, *supra* note 78, at 108 (explaining that judicial determination of legislative intent involves a question of "law").

116. *See* Note, *supra* note 11, at 180-86.

117. *Id.* at 171, 181; *see* FED. R. CIV. P. 52 advisory committee's note accompanying 1985 Amendments.

118. FED. R. CIV. P. 52 advisory committee's note accompanying 1985 amendments.

119. *See* Note, *supra* note 11, at 186-92.

120. *See* Note, *supra* note 15, at 757 (observing that "finder of fact . . . is in at least as good a position as an appellate body to draw inferences").

Indeed, district courts may well perform this function better than circuit courts because district courts routinely draw factual inferences from evidence.[121] This reality helps explain the decision of Rule 52's drafters to avoid extensive appellate court participation in traditional factfinding; it does not relate, however, to rulings on state *law*. In addition, courts do not decide state law issues solely on the basis of the limited body of evidence introduced in a single case, even though district court factual findings necessarily rest exclusively on that evidence. Moreover, circuit courts are far better equipped to collect and dissect the often expansive body of materials that do count in resolving legal issues.[122] Finally, considerations of policy seldom touch factual issues, whether or not their resolution hinges on credibility determinations. In contrast, rulings on law, including state law, often call for delicate policy judgments, thus heightening the value of collaborative judicial decisionmaking.[123] In short, state law determinations, unlike credibility-free fact determinations, implicate the many institutional advantages of circuit courts that in general justify de novo review of legal questions.[124]

These considerations suffice to answer the argument that the purposes and history of Rule 52 dictate its application to rulings on state law. Most importantly, however, the language

121. *See* STANDARDS RELATING TO APPELLATE COURTS § 3.11 commentary, at 23 (1977) (observing that "trial judge, unlike the appellate court, is regularly engaged in resolving issues of fact and is primarily responsible for doing so"); Clermont, *supra* note 78, at 1153-54; *cf.* Commissioner v. Duberstein, 363 U.S. 278, 289 (1960) (citing "fact-finding tribunal's experience with the mainsprings of human conduct").

122. *See, e.g.*, A. DERSHOWITZ, THE BEST DEFENSE 69 (1981) (maintaining that law "is within the special province of the appellate courts; it comes from the pages of books rather than the mouths of witnesses"); Thompson & Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1, 12 (suggesting that proper law finding "is not necessarily confined to the trial court record, and may require detailed analysis of statutory history and precedent, recourse to scholarly authority, and consideration of the literature of various disciplines"); *see also* Baumgartner v. United States, 322 U.S. 665, 670-71 (1944) (suggesting that even the "conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based"); *see generally infra* notes 135, 137-41, 160 and accompanying text (discussing institutional advantages of appellate courts).

123. *See infra* notes 226-30 and accompanying text.

124. *See generally infra* notes 129-64 and accompanying text (comparing advantages of trial and appellate courts). In addition, although credibility determinations play no part in resolving certain fact issues, these cases are unusual and may be difficult to distinguish from the bulk of cases, in which credibility does play some role.

of the "clearly erroneous" rule—limiting its application specifically to "findings of fact"—provides the surest signal that the rule's drafters intended neither in fact nor in spirit to construct a standard of review for state law determinations.

C. THE RULE OF DEFERENCE AND THE EXPERTISE RATIONALE

Mandated by neither Supreme Court command nor the Federal Rules, the rule of deference is a common-law creation of the courts of appeals based on the view that district court judges have special expertise in matters of local law. In order to evaluate this traditional rationale it is necessary to define precisely what *district court expertise* means and to consider why it matters.

The circuit courts have not begun to address these questions. Close reflection suggests, however, that appeals courts which allude vaguely to district court expertise probably subscribe to at least one of three distinct rationales. This Article will label these rationales as: (1) the "superior decisionmaker" rationale,[125] (2) the "collaborative review" rationale,[126] and (3) the "cost-benefit" rationale.[127] Careful examination suggests that none of these justifications packs persuasive punch.

1. The "Superior Decisionmaker" Rationale

The first elaboration of the "expertise" rationale is the most straightforward. It posits that district courts are, in general, *more expert* than circuit courts in deciding issues involving their own state's law. The rule of deference follows easily from this premise. Absent a sure sign of error, the rule will stop a less capable decisionmaker from substituting its judgment for that of a more capable decisionmaker. The result is that, in the run of state law cases, more litigants will get more correct decisions.[128]

This rationale suggests two critical points about district court expertise. First, the relevant question cannot be whether district courts are "expert" in some abstract sense. Instead, at-

125. *See infra* notes 128-64 and accompanying text.

126. *See infra* notes 165-68 and accompanying text.

127. *See infra* notes 165-67, 169-86 and accompanying text.

128. Of course, this observation does not mean that all legal questions have an identifiably "right" answer. *See* W. REHNQUIST, *supra* note 79, at 291 (stating that "[t]here is simply no demonstrably right answer to the question involved in many of our difficult cases"). Nonetheless, our society properly believes that one legal outcome in actual cases is as a rule superior to others. If this were not true, courts could resolve legal disputes by coin flip.

tention must focus on whether district courts render *expert decisions*. This point is important because, although heightened familiarity with state law will aid decisionmaking, other factors—such as time constraints and quality of advocacy—also affect decisional quality. All these factors matter in determining whether district courts are "expert" state law decisionmakers. Second, circuit court panels must judge the "expertness" of district courts as decisionmakers in relative, rather than absolute, terms. Deciding that district court judges are expert state law decisionmakers does not end the discussion. The inquiry instead must focus on *how much* decisionmaking "expertise" district courts have *in comparison to* the circuit courts. If district courts are not more expert decisionmakers than circuit courts, defenders of the rule cannot argue that deference keeps a less capable decisionmaker from disturbing a more capable decisionmaker's judgment.

Viewed through these lenses, the "superior decisionmaker" rationale for the rule of deference may lose some intuitive luster. The realities of modern judging confirm that the "superior decisionmaker" justification is dubious indeed.

a. *The limits on district court expertise.*

State law is now tremendously complex. State judicial decisions and statutory enactments in recent decades have multiplied exponentially.[129] Because the most capable attorney can assimilate only so much, more and more lawyers specialize, including those lawyers who ascend to the federal bench.[130] Con-

129. *See* Thompson & Oakley, *supra* note 122, at 16, 56. As one commentator has written:

> [C]onsequences flow from the sheer bulk of American precedent. The costs of litigation are increased, not only in terms of the expense of reports, digests, indexes, and texts, but also in terms of the time spent by lawyers and judges in poring over them . . . . There is also the grave danger that even competent and conscientious judges and lawyers may overlook important cases in the welter of reports, already so numerous as to be almost unmanageable. Despite restatements of the law, and despite even the development of electronic data-retrieval machines, the difficulty of separating the wheat from the chaff grows constantly more critical.

D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 155 (1963).

130. Commenting on this trend, the Chief Justice of the North Carolina Supreme Court recently noted that "[i]ncreased specialization is a legitimate response to the 'law explosion.'" J. Exum, *The Legal Profession—How Do We See Ourselves*, Address to Mecklenburg County Bar (Apr. 29, 1988), *reprinted in* 1 N.C. Law. Weekly, May 9, 1988, at 0136, 0137, col. 4. He further observed that: "Today there are a multitude of specialties and specialists, ranging from

stant growth and change in both state and federal law tax even these specialists' efforts to remain current in their chosen fields.[131] In short, no one possesses expertise in an entire body of state law.

District court judges are like most conscientious lawyers. Pressed by busy schedules and competing demands, they strive with only modest success to stay abreast of intricacies and trends in state law.[132] District court judges, through exposure to state law cases in practice and on the bench, will gain familiarity with some particulars of their own states' law. It strains credulity, however, to leap from that proposition to the conclusion that district court judges possess a *meaningful* expertise in a *substantial* portion of *all* state law.

The rule of deference attributes to district court judges more than a general grasp on state law. The rule assumes a sufficient depth and breadth of understanding that it often will aid resolution of those focused legal issues that generate appellate review. At least in the modern era, that basic supposition seems most doubtful.

b. *The institutional disadvantages of district courts.*

Given the difficulties of maintaining a detailed knowledge of an entire body of state law, the institutional ability of courts to find law in particular cases takes on paramount importance. On this institutional front, circuit court judges possess massive advantages over their district court counterparts. District court judges must act quickly; they must frame jury instructions at mid-trial, dispose of evidentiary objections instantly, and often rule from the bench on motions to dismiss or for directed verdict.[133] Indeed, district court judges sometimes comfort themselves with the thought that appellate review will correct errors made in this hurried process.[134]

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lawyers who will not come to the office unless there is a corporate takeover waiting, to those who are versed only in first amendment law, or fourth amendment law, to those who represent only second basemen or point guards." *Id.* at 0136, col. 4.

131. *See* Leventhal, *Appellate Procedures: Design, Patchwork and Managed Flexibility*, 23 UCLA L. REV. 432, 436 (1976) (predicting that "[i]ssues of increasing difficulty and subtlety . . . will tax the courts increasingly even if filings level off").

132. *See supra* note 41 and accompanying text.

133. *See infra* notes 135, 141 and accompanying text.

134. *See* J. HOWARD, *supra* note 15, at 132 (quoting former district judge); W. REHNQUIST, *supra* note 79, at 309. This tendency is hardly a recent development. *See* Hochster v. De la Tour, 118 Eng. Rep. 922, 928 (Q.B. 1853) (stat-

The fast pace of trial court proceedings also limits the amount of useful information that trial judges receive. Lawyers at trial must focus on logistics, witness preparation, jury selection, jury argument, presentation of evidence, cross-examination of adverse witnesses, and numerous, often unanticipated, questions of law. Burdened by these tasks, counsel often focus only limited attention on important legal issues. Consequently, the district court judge must rule on those issues with neither extended reflection nor extensive information.[135] These intensely practical limitations have no less impact on decisions of state law than on federal law determinations.

c. *The institutional advantages of appellate courts.*

The consideration of legal issues unfolds in a fundamentally different way in the federal circuit courts. The facts of the case, for all practical purposes, are settled on appeal.[136] The parties single out for review only a few focused issues of law.[137] The courts of appeals benefit from written briefs that target only these issues[138] and that often break new ground not plowed in the court below.[139] Unlike district courts, courts of

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ing "[i]t gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a Court of Error").

135. *See* STANDARDS RELATING TO APPELLATE COURTS § 3.11 commentary, at 21 (1977) (observing that "trial is an interchange whose incidents cannot be charted in advance" and that "the trial judge must make decisions rapidly and frequently, often without the benefit of carefully prepared argument by counsel"); C. WYZANSKI, *supra* note 70, at 20 (suggesting that trial judges deciding issues of law face difficulties because "the pace is quicker, the troublesome issues have not been sorted from those which go by rote, the briefs of counsel have not reached their ultimate perfection"); Godbold, *Fact Finding by Appellate Courts—An Available and Appropriate Power*, 12 CUMB. L. REV. 365, 372 (1982) (relating that district judge may act "without the luxury of time off the bench to reflect, . . . may have no briefs from counsel, and his findings can be made orally from the bench"); Thompson & Oakley, *supra* note 122, at 11 (stating that "argument in the trial court is not likely to be as fully informative as appellate argument"); *see also* Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707, 710 (1978) (noting that judge's reasoning may be faulty because "[h]e might have to hurry, and counsel might provide little help").

136. *See supra* note 106 and accompanying text.

137. *Cf.* FED. R. APP. P. 28(a)(2) (requiring appellant's brief to state "issues presented for review").

138. *See* FED. R. APP. P. 28; *see also* Godbold, *supra* note 135, at 372 (noting that appellate courts "have the benefit of briefs from counsel who have had the opportunity to search and assay the record").

139. *See, e.g.*, Anderson v. Sanderson & Porter, 146 F.2d 58, 62 (8th Cir. 1945) (relying on new information not presented to trial court).

appeals have access to the full printed trial record.[140] Appeals courts, although busy, do not face the day-to-day time constraints that confront district court judges.[141]

Circuit courts employ multi-judge panels,[142] which by design create numerous institutional advantages.[143] Assigning several judges to a problem reduces the risk that important lines of analysis will escape attention.[144] Each judge benefits from the others' insights, including their questions of counsel at oral argument.[145] The panel system creates a deliberative process in which critical thinkers of diverse backgrounds and experience may test, reflect on, and refine their colleagues' observations.[146] In short, a multi-judge court produces a mar-

140. *See* Godbold, *supra* note 135, at 372 (finding it significant that "the appellate tribunal will have available to it a full and verbatim written record").

141. *See* Carrington, *supra* note 82, at 527 (observing that "the tempo of the work of appellate courts allows for reflection and instruction that is not available to trial judges"); Leflar, *The Multi-Judge Decisional Process*, 42 MD. L. REV. 722, 722 (1983) (concluding that appellate "decisional process is less hurried"); Thompson & Oakley, *supra* note 122, at 11 (stating that "[a]ppellate decision proceeds at a slower pace and, generally, with a richer basis of information than decision in the trial court"); *see also* J. HOWARD, *supra* note 15, at 134-35 (concluding from survey of judges that "main functional distinction drawn between trial and circuit courts was pacing—that is, instant versus reflective judgments"); Godbold, *supra* note 135, at 372 (noting that appellate judges exchange views "with both the time and the means to reexamine and refine these views").

142. *See* 28 U.S.C. § 46(c) (1982).

143. *See* STANDARDS RELATING TO APPELLATE COURTS § 3.10 commentary, at 15 (1977) (concluding that "thoughtful consideration of the merits of the case by at least three judges" is basic element of "an appeal of right"); P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 82, at 8 (describing multipartite nature of appellate review as a "process imperative").

144. *See* Leflar, *supra* note 141, at 722 (observing that "[a]ll relevant considerations are more surely recognized and taken into account when more than one person is charged with identifying and bringing them forward"); Thompson & Oakley, *supra* note 122, at 11 (arguing that multiple "judges on an intermediate appellate court . . . are more likely to have explored the alternatives in greater depth").

145. *See* W. REHNQUIST, *supra* note 79, at 277 (suggesting that "judges' questions, although nominally directed to the attorney arguing the case, may in fact be for the benefit of their colleagues"); Leflar, *supra* note 141, at 723-24 (arguing that because "practically all courts in this country expect their judges to read the briefs in advance of submission, and nearly all judges consistently do so . . . there is reasonable opportunity for intelligent participation by every judge in the hearing and discussion of each case").

146. *See, e.g.*, STANDARDS RELATING TO APPELLATE COURTS § 3.01 commentary, at 9 (1977) (observing that "[t]he basic concept of an appeal is that it submits the questions involved to collective judicial judgment"); Godbold, *supra* note 135, at 372 (emphasizing that an "appellate tribunal . . . acts through multiple judges who draw from each other's perceptions and experience, critique each other's views and decide by at least a majority"); Leonard, *The Correct-*

ketplace of ideas designed to increase the likelihood that the truth will emerge.

Appeals courts, unlike district courts, also routinely craft written opinions. The discipline of committing reasons to writing aids accurate decisionmaking,[147] especially when the judge undertakes the work from the outset, as appellate judges do. In contrast, many district courts' written opinions rely on proposed conclusions of law that self-interested parties submit.[148] The interaction of opinion writing and multi-judge decision-

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ness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation, 17 LOY. L.A.L. REV. 299, 299-300 (1984) (noting that "appellate courts are multi-judge bodies staffed by people from different backgrounds and possessing different legal philosophies"); Leventhal, *supra* note 131, at 440-41 (relating that appellate judges often "hold quite divergent views . . . [and such] interchange enhances analysis and understanding"); Meador, *Appellate Case Management and Decisional Processes*, 61 VA. L. REV. 255, 281 (1975) (stating that appellate procedure "contemplates that a broader perspective and a more contemplative wisdom than a single judge can provide will be brought to bear on the issues"); Stern, *supra* note 78, at 82 (arguing that because "a group of men is more representative than a single person, the appellate court resembles the jury more than does the trial court . . . [a]nd the decisions of the appellate courts have the advantage of the collaboration and interchange of ideas of three or more men"); *cf.* J. HOWARD, *supra* note 15, at 190, 207 (documenting that "collegiality . . . imposes informal expectations of open-mindedness or give and take in reaching joint decisions"); *compare* Dick v. New York Life Ins. Co., 359 U.S. 437, 458 (1959) (Frankfurter, J., dissenting) (stating that a "fruitful interchange of minds . . . is indispensable to thoughtful, unhurried decision and its formulation in learned and impressive opinions") *with* Godbold, *supra* note 135, at 372 (noting that a trial "judge acts alone and without the benefit of other minds that might examine, supplement and even disagree with his views").

147. *See* Lasky, *Observing Appellate Opinions from Below the Bench*, 49 CALIF. L. REV. 831, 832 (1961) (stating that one function of an appellate opinion is to make judges think); Leflar, *Some Observations Concerning Judicial Opinions*, 61 COLUM. L. REV. 810, 810 (1961) [hereinafter Leflar, *Observations*] (stating that "preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the law's bearing upon them"); Leflar, *Sources of Judge-Made Law*, 24 OKLA. L. REV. 319, 319 (1971) [hereinafter Leflar, *Sources*] (observing that "the writing of an opinion compels a court to engage in a thoughtful process of reasoning and analysis"); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 790-91 (1981) (discussing how "desirability of opinions" stems from process of writing down ideas); Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. CHI. L. REV. 211, 218 (1957) (finding no "better test for the solution of a case than its articulation in writing, which is thinking at its hardest").

148. *See* Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 330 (4th Cir. 1983) (reviewing district court adoption of plaintiff's counsel's lengthy proposed findings of fact and conclusions of law), *cert. denied*, 466 U.S. 951 (1984); EEOC v. Federal Reserve Bank, 698 F.2d 633, 640 (4th Cir. 1983) (noting trial court adopted, almost word for word, conclusions of law drafted by prevailing party), *rev'd sub nom.* Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984).

making—which always produces careful scrutiny by peers and may produce focused criticism and separate dissents or concurrences—also contributes to decisional accuracy.[149]

Courts of appeals are largely insulated from political, personal, and other extraneous pressures, a fact that helps explain why appellate courts exist.[150] District courts are more subject to these influences because they are "local" courts. Litigants may be prominent local citizens; cases may stir strong local feeling; counsel may be on friendly terms with the resident district court judge. Although district court judges seek to overcome these influences, the effects of such influences can be subtle.[151] Review by a multi-member appeals panel reduces the risk that such factors will affect the final decision. Indeed, this consideration provides ammunition for the argument that de novo review is of the greatest importance in the very state law cases to which the rule of deference applies. Congress, after all, assigned diversity cases to the federal courts precisely because such cases present a heightened danger of "the influence of local opinion."[152]

These institutional differences suggest that circuit courts possess far greater "expertise" than district courts in deciding state law issues.[153] One other institutional difference, however,

149. *See* D. KARLEN, *supra* note 129, at 54 (stating that judge's colleagues "offer suggestions freely, either in person, by telephone, or by written notes, in an effort to reach agreement"); Godbold, *supra* note 135, at 372 (noting that "appellate court's findings will be recorded in a written opinion that must surmount the barrier of at least majority assent"); *see also* Jones, *Cogitations on Appellate Decision-Making*, 52 N.Y. ST. B.A. J. 189, 217-22 (1980) (analyzing value of concurring and dissenting opinions).

150. *See* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 453 (1963) (observing that "possibilities of error, oversight, arbitrariness and even venality in any human institution are such that subjecting decisions to review of some kind answers a felt need").

151. *See* A. DERSHOWITZ, *supra* note 122, at 317 (noting that judges "read the same newspapers, watch the same TV programs, and listen to the same local gossip as other citizens"); Vestal, *supra* note 82, at 380 (stating that judges have been "dishonest[,] [motivated by] narrow personal interests[,] . . . arrogant, angry, unhappy, sympathetic, humble").

152. Lankford v. Platte Iron Works Co., 235 U.S. 461, 478 (1915) (Pitney, J., dissenting); *accord* Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945) (noting that "[d]iversity jurisdiction is founded on assurance to nonresident litigants of courts free from susceptibility to potential local bias."); *see also* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923) (stating that diversity jurisdiction seeks to afford to citizens of another state "law administered free from . . . local prejudices or passions").

153. Moreover, other institutional differences are not difficult to identify. For example, the ability to review an earlier decision by another judge aids the

does even more to dispel the notion of district court superiority.

d. *The cultivation of law-finding expertise.*

District court judges, according to some circuit courts, possess greater expertise in a particular state's law because they work more intimately with that body of law.[154] This argument, however, ignores a more basic point: deciding issues of law "expertly" is not the primary role of district court judges. District court judges spend much, if not most, of their working time deciding issues of fact or judgment or policing jury resolution of fact issues.[155] In addition to conducting jury trials, district court judges often sit as factfinders, who must sift through conflicting evidence and then reduce factual findings to writing.[156] In both the criminal and civil spheres, district court judges administer busy courts.[157] District court judges must hold calendar calls, conduct or oversee jury *voir dires*, and contend with routine interruptions by lawyers seeking continuances, expedited hearings, and other scheduling orders. District court judges also spend many hours addressing discovery disputes, deciding motions concerning transfers, stays, and sentencing, and attending to other discretionary matters that seldom surface on appeal.[158] Although discharging these many duties provides valuable on-the-job training for any district court judge, none of them relates to the resolution of purely legal questions.

In contrast, deciding issues of law expertly *is* the primary role of appellate judges. By design they spend the majority of

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court of appeals in decisionmaking. In addition, "larger circuits employ central staff attorneys to help separate the wheat from the chaff in litigation." J. HOWARD, *supra* note 15, at 7. "Courts of Appeals . . . rotate panel memberships randomly to ensure impartial decisions." *Id.* at 9. Moreover, "[i]nasmuch as the appellate courts occupy a superior position in the judicial hierarchy, the appellate judges are certainly likely to be no less expert and able than the trial judges." Stern, *supra* note 78, at 82.

154. *See supra* notes 41-42 and accompanying text.

155. *See* Leonard, *supra* note 146, at 301 (observing that "[t]rial courts are at the front lines of fact-finding . . . [and] therefore, do not exist for the purpose of making law").

156. FED. R. CIV. P. 52(a) provides: "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . ."

157. *See* J. HOWARD, *supra* note 15, at 135 (stating that district court judges are customarily referred to as "workhorses of the federal judiciary").

158. *See generally* STANDARDS RELATING TO APPELLATE COURTS § 3.11 commentary, at 24 (1977) (discussing different functions of trial and appellate courts); Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 665 (1971) (discussing power and responsibility thrust on trial judges who use review-limiting discretion on many issues).

their working hours inquiring into, reflecting upon, and writing about those "pure" legal issues that the rule of deference concerns.[159] This narrowed job description ensures that appellate judges have more time to ponder the law.[160] More fundamentally, however, this focus of function serves to ensure, as an institutional matter, that appeals judges become specialists in untangling knotty legal problems. If it is true that the duties of district court judges alert them to intricacies and trends in a particular state's law,[161] it is also true that the work mix of appeals judges alerts them to intricacies and trends in the law generally. In addition, immersion in the lawfinding function affords appellate judges greater and steadier training in the complex arts of construing statutes, reconciling lines of authority, and distilling broader governing principles from a large body of decisions.[162] Discerning state law, no less than discerning federal law, requires the use of these skills.

e. *Rejecting the "superior decisionmaker" rationale.*

All these considerations point to a single conclusion: district courts are not superior to circuit courts in deciding state law issues that are sufficiently controversial to generate appeals. This conclusion does not mean that district court judges lack analytical sophistication. Indeed, such a contention would be outrageous. The point is rather that appeals court panels possess important institutional advantages unavailable to district court judges in deciding issues of both federal and state law. This conclusion is hardly startling, because the courts of appeals are courts of review, created for the very purpose of providing legal conclusions more sure-footed than those reached by the district courts whose work is being scrutinized.[163] In short, *some* heightened expertise of district court

159. *See* J. HOWARD, *supra* note 15, at 130-31 (reporting that Third Circuit time study shows that preparing and clearing opinions consumes more circuit judge time than all other functions combined).

160. *See supra* note 141 and accompanying text.

161. *See supra* note 41 and accompanying text.

162. *See* Stern, *supra* note 78, at 90 (suggesting that courts of appeals are "composed of specialists . . . in the technique of deciding cases on appeal"); *see also* Thompson & Oakley, *supra* note 122, at 64 (arguing that collegiality contributes to the "growth of . . . judges . . . [and] the growth adds credence to the process of appellate review").

163. *See* Stern, *supra* note 78, at 113 (stating that "the creation of appellate courts with full power to review in itself reflects a strong policy that litigants should not be bound by the ruling of the subordinate tribunal . . . [because] the decision made by the appellate court is more likely to be 'correct' ").

judges on *some* state law matters does not outweigh the many built-in law-finding advantages circuit courts possess in *all* cases. Moreover, however expertise is defined, the expertise of three judges must compare favorably with the expertise of only one.[164]

2. The "Collaborative Review" and "Cost-Benefit" Rationales

The very implausibility of viewing district courts as superior to appellate courts in finding state law suggests that a more subtle version of the "district court expertise" rationale underlies the rule of deference. Such a rationale must rest on a premise that is less ambitious than viewing district courts as *superior* decisionmakers in matters of state law. In fact, two separate alternative rationales are available.

The first of these rationales posits that even if district courts are not better state law decisionmakers than appeals courts, their added expertise in state law cases may justify a sort of "collaborative review." Under this line of reasoning, the rule of deference serves to blend the district court's special insights on state law with the appellate panel's institutional advantages. According to the theory, this collaborative approach produces in general more accurate results in state law appeals than does traditional de novo review.

Alternatively, the rule of deference may rest on a "cost-benefit" rationale. Unlike both the superior decisionmaker and collaborative review rationales, the cost-benefit theory does *not* claim that the rule of deference produces more accurate results in state law appeals. Like the collaborative review theory, however, this cost-benefit approach assumes that the gap between circuit court and district court capabilities is substantially more narrow in state law cases than in federal law cases. Given this narrowed gap, the argument goes, it makes sense to shift limited appellate court resources from state law cases to federal law cases, in which the use of such resources is much more likely to improve results. In other words, the *cost* of accepting some additional errors in state law cases is more than offset by the *benefit* of redirecting limited resources to federal law cases, in which those added resources will be put to better use.

The common thread linking the collaborative review and

164. *See* Carrington, *supra* note 82, at 527 (noting that "three heads are better than one"); Leflar, *supra* note 141, at 722-23 (noting advantages of group decisionmaking); Note, *supra* note 15, at 759 (arguing that "collective opinion" is superior).

cost-benefit rationales is apparent. Each rationale posits that there is good reason to treat state law and federal law cases differently. That reason is the supposition that a narrowed gap between district court and circuit court expertise makes full-scale appellate review to some *meaningful* extent less valuable in achieving accurate decisions in state law appeals than in federal law appeals. Because this supposition is key to both the "collaborative review" and "cost benefit" rationales, it calls for close scrutiny.

a. *The difficulty of finding a substantially narrowed expertise gap.*

The premise that the "expertise gap" between district and appellate courts differs significantly in state law and federal law cases is of dubious accuracy. The institutional considerations detailed above reveal a wide gap between circuit court and district court lawfinding expertise in *all* cases. Significantly, the proposition that the circuit courts enjoy greater lawfinding expertise rests on myriad and incontrovertible institutional advantages such as collaborative decisionmaking, greater time, more focused attention, and greater cultivation of lawfinding expertise.[165] It is implausible to suggest that a balance of institutional expertise based on these *many important* factors will shift significantly through the introduction of the *single* additional consideration that district court judges supposedly enjoy some "special expertise" in state law cases. This is especially true in light of the growth of legal specialization and the proliferation of legal materials, which suggest that any supposed "special expertise" is severely limited, if not entirely illusory.[166] Indeed, deference may be *less* justified in state law cases than in federal law cases because state law cases pose a greater risk of improper local influence.[167]

To justify the rule of deference, special considerations of expertise must warrant greater appellate court restraint in state law than in federal law cases. Considering *all* factors, however, no *meaningful* difference appears between state law and federal law cases. This basic deficiency in both the collaborative review and cost-benefit theories is not, moreover, the only difficulty marring these rationales.

165. *See supra* notes 133-49, 154-62 and accompanying text.
166. *See supra* notes 129-32 and accompanying text.
167. *See supra* notes 150-52 and accompanying text.

b. *Additional difficulties with the "collaborative review" rationale.*

The collaborative review rationale also is problematic because it rests on speculation. The theory presupposes not only that district courts have additional expertise in state law cases, but also that the rule of deference properly gauges that added degree of expertise, so that circuit courts will reach accurate results in state law cases more often with the rule than without it. The only possible support for this proposition, however, is intuition.

In addition, the collaborative review rationale conflicts with accepted notions about good collaborative decisionmaking. According to this rationale, a district court judge's function is analogous to serving as a fourth member of an appellate court panel, even though the district judge does not hear the same arguments as the appellate court panel, conduct the same study as the appellate court panel, or deliberate with the panel. In light of these difficulties, it is not surprising that rule of deference proponents do not rely heavily on the "collaborative review" rationale. Instead, they justify the rule with a cost-benefit analysis encompassing more than the rule's effect on the accuracy of results in state law cases.[168]

c. *Additional difficulties with the cost-benefit rationale.*

Characterized most unsympathetically, the cost-benefit rationale balances the benefits of affording de novo review in state law cases against the *fiscal* costs of affording that review. In substance, this version of the cost-benefit theory justifies the rule of deference because the rule reduces costly appeals, reversals, and resulting new trials in state law cases while only marginally reducing decisional accuracy.[169] This money-changing

168. *See* Note, *supra* note 11, at 182-83; *see also In re* McLinn, 739 F.2d 1395, 1403 (9th Cir. 1984) (en banc) (Schroeder, J., dissenting) (arguing that rejection of rule of deference "will encourage unsuccessful counsel to appeal on the assumption that reversals will become more frequent" and appellate caseload will increase greatly); *cf.* Anderson v. City of Bessemer City, 470 U.S. 564, 574-75 (1985) (suggesting that efficiency concerns help justify "clearly erroneous" review of fact findings); STANDARDS RELATING TO APPELLATE COURTS § 3.11 commentary, at 20 (1977) (stating that deference on factual issues "reflects considerations of economy").

169. One writer, for example, states:

> If the de novo standard of review confers only marginal benefits in certain circumstances . . . these benefits may be insufficient to counterbalance the costs inherent in the consumption of resources that accompanies the broader standard. These costs include not only

mode of cost-benefit analysis, however, raises a fundamental problem. For analysts grounded in the rule of law, it is distasteful to discourage appeal rights and to tolerate incorrect results solely to save money. Some advocates therefore might favor a more humane statement of the cost-benefit analysis.[170]

According to this alternate formulation of the cost-benefit rationale, the reality of limited resources should induce appellate courts to look at the totality of their work. In state law cases, the argument goes, the gap in expertise between circuit courts and district courts is usually narrower than in the general run of cases. As a result, appellate review in state law cases will result in fewer corrections of legal error. It therefore should follow that in state law cases the courts of appeals can lower their guard. This cost-benefit approach recognizes that diluted appellate review will leave in place more incorrect results in state law cases than would de novo review, but finds that price worth paying to preserve appellate resources for federal law cases, in which appellate efforts are likely to do more good.[171] This version of the cost-benefit theory may be particularly appealing in the present day because appeals courts "over the last three decades have been forced to adopt efficiency devices to cope with bloated caseloads."[172]

This "overall results" variation on the cost-benefit rationale stands in marked contrast to the superior decisionmaker and collaborative review rationales. According to the cost-benefit analysis, the rule of deference does not produce more results that are correct in the run of state law cases, but rather more results that are correct in the run of *all* cases through redirection of resources to those cases most likely to benefit from probing appellate review. To bolster this cost-benefit analysis, proponents assert that circuit court decisions in state law cases also do not advance the ordinary appellate goals of uniformity

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> the additional time involved in plenary review of a given case, but also the resources consumed in the remand and retrial of actions reversed under the broader standard, as well as the time required to hear additional appeals that will not succeed even under an eased standard of review.

Note, *supra* note 11, at 183; *see also id.* at 186-89 (suggesting that judicial economy and allocation of judicial authority favor application of "clearly erroneous" rule).

170. *Cf.* Summers, *supra* note 135, at 785-86 (distinguishing between "rightness-minded" and "goal-minded" judges).

171. *See* Note, *supra* note 11, at 183.

172. Thompson & Oakley, *supra* note 122, at 4.

and predictability in the law.[173] Uniformity is not achieved because circuit court decisions do not bind state courts;[174] predictability is not enhanced because "[c]itizens cannot rely on the state law decisions of federal courts in ordering their own affairs."[175] Advocates of cost-benefit analysis cite these supposed reductions in the "benefits" of full-scale circuit court review to reinforce the case for the purportedly more efficient rule of deference.[176]

This cost-benefit rationale is flawed not only because it rests on the faulty premise that there exists some *meaningful* difference between the "expertise gap" in state law and federal law cases.[177] Most importantly, the cost-benefit rationale also assumes that the rule of deference streamlines resolution of state law questions so as to free up appellate court time for more careful review of federal law issues. This premise, however, is empirically questionable. As the majority stated in *In re McLinn*, the appellate court "must undertake the same full and careful review of the pertinent legal authorities whether or not deference is to be accorded."[178] In addition, the very need to define and apply the rule of deference may generate additional appellate work not required if all cases were subject to de novo review.[179]

Finally, this cost-benefit argument exaggerates the failure of full scale review to achieve uniformity and predictability of state law. In fact, circuit-court review in *all* cases serves these goals only in a limited fashion. For example, federal court rulings on federal law do not bind state courts any more than federal court rulings on state law.[180] It hardly follows, however, that federal appeals courts should defer to district court rulings on federal law because de novo review does little to increase

173. *See* Note, *supra* note 11, at 184-85, 189-90.

174. *Id.* at 190.

175. *Id.*; *see, e.g.*, Peterson v. U-Haul Co., 409 F.2d 1174, 1177 (8th Cir. 1969) (stating that "federal court decisions in diversity cases have no precedential value as state law and only determine the issues between the parties").

176. Note, *supra* note 11, at 191.

177. *See supra* text accompanying notes 165-67.

178. 739 F.2d 1395, 1400 (9th Cir. 1984) (en banc). Judge Wald, discussing judicial review of agency proceedings, made the same point: "[E]ven if our scope of review were narrowed by Supreme Court interpretation of existing law, it would be unlikely to result in any real appellate economies. Judicial review would likely still be invoked as frequently and consume as much court effort regardless of the formula used." Wald, *supra* note 15, at 773.

179. *See infra* text accompanying notes 241-42.

180. *See*, Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510 (1954).

uniformity and predictability. Moreover, circuit court pronouncements on state law do contribute to stability and predictability in the law. Fully reasoned decisions bind at least all subordinate federal district courts, and enhance the quality and predictability of state court litigation by illuminating analyses state courts may use in later litigation.[181]

The overall results rationale fails, however, wholly apart from these empirical shortcomings. The rationale has a more fundamental flaw. It ignores the time-honored function of our appellate courts: to afford *individual* justice in *individual* cases.[182]

Any analysis of a rule of law, whether or not called a cost-benefit analysis, must seek to preserve the fundamental values underlying our legal system. "[T]he basic concept of our system [is] that legal burdens should bear some relationship to individual responsibility or wrongdoing."[183] The overall results version of cost-benefit analysis violates this principle by diluting the individual rights of appellants in state law cases without any regard to their individual circumstances. Many, if not most, litigants pressing state law appeals receive no more "expert" a treatment from the district court than appellants raising federal law issues. The rule of deference, however, mandates substandard appeals for these state law litigants by lumping them together with those parties involved in state law cases about which the sitting district court judges possibly possess some genuine expertise. Our government and courts lose legitimacy, authority, and acceptance when they treat individuals not as individuals, but as part of a group whose claims must be processed.[184]

181. *See* Leventhal, *supra* note 131, at 435 (stating that "institutional function" of circuit courts . . . "consists of developing and declaring law" and that "intermediate courts contribute to this function by promoting judicial dialogue"); *see also* Note, *supra* note 15, at 759-60 (observing that "many state courts often do look to federal decisions, and they should be able to rely on the courts of appeals' decisions as embodying the best approach").

182. Professor Howard, who interviewed many circuit court judges about the central function of their courts, reports that "these judges emphasized the law and justice of *discrete cases*." J. HOWARD, *supra* note 15, at 128 (emphasis added). As one judge observed: "There is no substitute for deciding the immediate case with justice for the parties." *Id.*; *see* STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary, at 4 (1977) (stating that "intermediate appellate court has primary responsibility for review of individual cases"); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1804) (stating that "[t]he province of the court is, solely, to decide on the rights of individuals").

183. Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 175 (1972).

184. *See, e.g.*, L. TRIBE, *supra* note 80, at 667. Commentators such as Pro-

The cost-benefit approach to the rule of deference also clashes with basic traditions in our law. Its logic dictates, for example, that courts of appeals should lower the standard of review in all cases—including federal cases—decided by seasoned district court judges because circuit panels can expect such judges on the whole to perform their functions more effectively than their colleagues of limited experience. Our law, however, has never endorsed this type of refocusing from individual rights to aggregate results. In a similar vein, empirical studies might show that district court judges are less likely on the whole to err in police brutality cases. It would hardly follow from this fact, however, that courts of appeals should apply the "clearly erroneous" standard in reviewing substantive law rulings in all police brutality cases. Such an approach would disregard our society's commitment to *individual* rights, to the special role of the *courts* as the guardian of those rights, and to the belief that different litigants in the *same court* should have the *same law* applied to their cases.[185] These same concerns undermine the "cost-benefit" justification for the rule of deference.

As Professor Corbin stated: "The poor litigating parties should not be forgotten. In each case alike they are entitled to a day in a court of justice, operating according to our judicial system, making use of all those sources of wisdom by which justice is determined."[186] When state law litigants exercise appeal rights, our judiciary should not refuse to treat them "alike" or

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fessor Meador emphasize the value of "differentiated procedures" for different cases on appeal. "The premise is that while every case should receive full and fair consideration it should receive no more consideration and take no more time than is necessary for the appellate judicial function." Meador, *supra* note 146, at 273. Professor Meador goes on to define one aspect of the appellate function as ensuring "that the law and the facts in every case are considered by each of the judges sufficient to assure his *independently reasoned* conclusions." *Id.* at 272 (emphasis added). Contrary to Professor Meador's concept of appellate efficiency, the cost-benefit justification for the rule of deference adjusts the standard of review for the very purpose of diluting the role of "independently reasoned conclusions."

185. "The courts must not improve efficiency in ways that endanger justice, the appearance of justice, principled decision making, or the evolution of doctrines that are responsive to the needs of society." Leventhal, *supra* note 131, at 436.

186. Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 772 (1941); *see also* Leflar, *supra* note 141, at 723 (observing that multi-judge courts "could dispose of more cases if single judges took complete responsibility for cases assigned to them, but quick disposal of appeals, though having a certain value, is far from the principal value served by the appellate process").

to deny them "*all* those sources of wisdom" normally brought to bear on appellate review.

d. *Rationales based on redefining the rule.*

Proponents of the rule of deference might distill three additional defenses from the vaguely stated rationale of district court expertise. These defenses, unlike the justifications considered earlier, do not offer support for the rule as typically articulated. Instead, they in effect recharacterize the rule in more diluted and therefore less objectionable terms. None of these "justifications," however, persuasively explains the rule.

First, one circuit court panel has suggested that the expertise rationale supports using the rule of deference as a "tie-breaker."[187] If taken literally, however, this approach renders the rule of deference meaningless. This is so because circuit courts, even without the rule, in general will not reverse if the arguments on both sides of a legal issue are equally persuasive.[188]

Under the second of these theories, the rule of deference is defensible because it provides only a "slight bump" in favor of affirming state law rulings. In other words, a modest amount of deference, but *only* a modest amount, is justifiable in state law cases based on the "special expertise" of district court judges. As with the tie-breaker rationale, the courts' actual formulations of the rule—typically framed in terms of "great weight," "substantial weight," or "clear error"[189]—do not square with this theory. In any event, even a "modest deference" rule mandates at least some special deference in state law cases and therefore is subject to the same criticisms leveled at the rule of deference both above and below.[190]

Finally, defenders of the rule of deference might assert that the rule is acceptable because it operates in practice only in cases where deference is peculiarly appropriate. For example, one asserting this justification might claim that appeals courts actually apply the rule only to nonrecurring legal issues disposed of in the court below by an especially competent district court judge.[191] In such cases, the individualized determi-

187. *See In re* Erickson, 815 F.2d 1090, 1095 (7th Cir. 1987).

188. *See* A. HORNSTEIN, APPELLATE ADVOCACY IN A NUTSHELL § 3-2, at 35 (1984).

189. *See supra* notes 20-28 and accompanying text.

190. *See supra* notes 76-186, *infra* notes 198-247 and accompanying text.

191. *See* Louis, *supra* note 78, at 1016 & n.160 (suggesting that appellate

nation of competence greatly strengthens the rule's expertise rationale and the rule's restriction to rarefied issues bolsters the rule's cost-benefit justification.[192] This revisionist theory of the rule of deference, however, runs against both its standard formulation[193] and its actual application.[194] Moreover, even if such *de facto* limits on the rule exist, many basic objections to the rule remain applicable. The rule still compromises appellate protection of individual rights,[195] subverts the "legitimating purpose" of appellate review,[196] and subordinates—on the basis of doubtful assumptions—the profound institutional advantages of circuit courts.[197]

Most importantly, this proposed "justification" for the rule of deference does not support that rule at all. Instead it supports a different and far more limited rule not yet articulated by the courts. If, in fact, deference is warranted or actually afforded only in such a narrow class of cases, courts should abandon explicitly the broad existing rule and candidly adopt a new, limited rule in its place.

III. THE NEGATIVE EFFECTS OF THE RULE OF DEFERENCE

The preceding inquiry into the expertise rationale for the rule of deference suggests flaws that go beyond the failure of the stated justification. That examination indicates that the rule is a bad one. If the "superior decisionmaker" and "collaborative review" rationales lack foundation, then abandoning the rule of deference should produce more correct results in state law cases. If the protection of individual rights is more than a hollow promise, courts should reject the rule of deference despite the cost-benefit justification.

Full inquiry into the merits of the rule of deference, however, must range beyond evaluation of its "expertise" rationale. Precisely because the rule is rooted in the common law, a broader look at its policy implications is necessary. Such a look is sobering, for the rule raises myriad problems that courts embracing the rule have not yet addressed.

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courts often review more aggressively decisions that they perceive to be important or that they believe flow from less capable or trustworthy judges).

192. *See supra* notes 41-42, 169-76 and accompanying text.
193. *See supra* notes 20-28 and accompanying text.
194. *See supra* note 33 and accompanying text.
195. *See supra* notes 182-84 and accompanying text.
196. *See infra* notes 207-13 and accompanying text.
197. *See supra* notes 165-67 and accompanying text.

The rule of deference, for example, prevents state courts from hearing the considered views of federal appellate courts on state law issues.[198] It weakens the moorings of the Supreme Court's practice of accepting state law rulings already affirmed on appeal.[199] The rule of deference may create, particularly in multi-district states, conflicting decisions on the same issue by the same court of appeals.[200] The rule produces circuit court decisions that serve, as a practical matter, as precedents, even though the holding of the panel is not an independent appellate construction of state law.[201] Moreover, formulations requiring "substantial" or "great" deference are vague and invite uncer-

198. *See* Note, *supra* note 15, at 754 (observing that when "the federal courts are denied the right to participate creatively in the development of the law . . . the litigants and the law itself are doomed to suffer"); *see also* Hart, *supra* note 180, at 510 (stating that "healthy development of law is paralyzed without the creative participation of courts").

199. *See In re* McLinn, 739 F.2d 1395, 1399-1400 (9th Cir. 1984) (en banc); Note, *supra* note 15, at 756 & n.47; *supra* text accompanying notes 90-95. Indeed, language in some Supreme Court cases deferring to lower court rulings suggests that the Court understood that the courts of appeals had independently considered the state law issues. *See, e.g.*, United States v. Durham Lumber Co., 363 U.S. 522, 527 (1960) (stating that "the *Court of Appeals* is much closer to North Carolina law than we are [and] . . . we cannot say that *the court's characterization* . . . under that law is clearly erroneous") (emphasis added); Huddleston v. Dwyer, 322 U.S. 232, 237 (1944) (noting that Court ordinarily accepts "*considered* determination of questions of state law by the intermediate federal appellate courts") (emphasis added). If Supreme Court practice presupposes independent review by circuit courts, it seems a small step to say that such review is dictated by Supreme Court pronouncement. In addition, the rule of deference parallels the "two-court rule" that the Supreme Court applied to fact findings in equity prior to adoption of the *Federal Rules of Civil Procedure*. Under that rule, the Court did not scrutinize factual findings upheld by a court of appeals, *e.g.*, Baker v. Schofield, 243 U.S. 114, 118 (1917), notwithstanding the traditional view that "in equity, matters of fact as well as of law are reviewable," Virginian Ry. v. United States, 272 U.S. 658, 675 (1926). In commenting on this rule of deference, Justice Jackson observed that: "Such a rule would have *no support in reason* if the second court could not make its findings as a result of its *own* judgment." District of Columbia v. Pace, 320 U.S. 698, 702 (1944) (emphasis added).

200. *See McLinn*, 739 F.2d at 1402 n.3. This result creates a tension with Supreme Court case law because, if "the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination," Guaranty Trust Co. v. York, 326 U.S. 99, 112 (1945), then it seems to follow that the division or district of the federal court in which the litigant lives and brings suit ought not create different results when two litigants appeal an issue of law to the same circuit court.

201. *McLinn*, 739 F.2d at 1402 n.3; *see also* 1A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 0.309[2], at 3124 & n. 23 (stating that when "a higher federal court has expounded the law of the state on the particular point, a lower court will follow that decision, in the absence of an authoritative state decision").

tain and uneven appellate review.[202]

Even more fundamental problems, however, infect the rule of deference. First, the rule erodes the "psychological" or "legitimating" function of appellate review.[203] Second, the rule ignores the teachings of modern jurisprudence.[204] Third, the rule needlessly compels courts in some cases to choose between anomalous results and distasteful "judge-rating."[205] These problems give rise to additional arguments against the rule of deference.

A. THE RULE OF DEFERENCE AND THE LEGITIMATING FUNCTION OF APPELLATE REVIEW

It often is said that the purposes of appellate review are to correct errors and to create and clarify a body of law.[206] Appellate review, however, serves a distinct and important additional purpose that often is overlooked. It serves what may be called a "psychological" or "legitimating" function.[207]

For litigants, judicial disputes—and trials in particular—are dramatically personal and emotional events. The trial judge is the center of attention in these proceedings. The litigant perceives that judge as the single individual holding power over the litigant's fate. Litigants who lose at trial focus their antipathy on the trial judge. With or without justification, losing litigants often view that judge as inept, biased, or corrupt. These feelings run deep. They create anxiety for litigants and undermine confidence in the judicial system. One vital function of any system of appeal is to neutralize these hostilities.[208]

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202. *See* Clermont, *supra* note 78, at 1151 (arguing for rejection of highly vague standards of review); *see also id.* at 1155 (complaining that courts exercising "abuse of discretion" review "in fact . . . are left fairly free to exercise whatever review they wish"); *cf.* Rostker v. Goldberg, 453 U.S. 57, 69-70 (1981) (stating that "[a]nnounced degrees of 'deference' to legislative judgments . . . may all too readily become facile abstractions used to justify a result").

203. *See infra* text accompanying notes 206-13.

204. *See infra* text accompanying notes 214-30.

205. *See infra* text accompanying notes 231-47.

206. *See, e.g.*, STANDARDS RELATING TO APPELLATE COURTS § 3.00 commentary, at 4 (1977); P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 82, at 2-3; Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618 (1974); Leonard, *supra* note 146, at 299.

207. The term *'psychological' or 'legitimating' function* is the author's.

208. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 82, at V, 1 (observing that "appellate justice can be the last best effort of our government and our law to gain the respect and acceptance of the people" and arguing that appellate courts should "resolve disputes . . . in a manner which inspires public confidence"); Meador, *supra* note 146, at 278 (noting impor-

Our appellate system serves to defuse antagonism directed at the trial judge by affording a fair hearing, both in fact and in appearance, to litigants who believe that judge has wronged them. By thus legitimizing lower court proceedings, the appellate process fulfills a central aim of the law[209]—to "preserve both the appearance and reality of fairness, *'generating the feeling, so important to a popular government, that justice has been done.'* "[210] As one appellate judge observed: "Quite apart from providing a body of precedent and determining litigants' rights, the appellate process should give the litigant and the public at large the feeling that justice has been served .... It is just as important to reinforce that confidence as to efficiently produce judicial decisions."[211]

The rule of deference undermines this "legitimating" func-

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tance "of affording the litigants a sense of justice's being done"); *see also* Leflar, *supra* note 141, at 723 (emphasizing need for "public confidence" in appellate courts).

The reality of personal involvement and untrusting reactions of losers at trial should not surprise observers of human nature; it is perfectly predictable that persons will become aggressively and emotionally involved in confrontational situations and blame adverse results on "the system" and the person in charge. History confirms these observations:

> Indeed, at the outset an appeal was in effect an attack on the judge who had rendered the adverse decision; the proceeding took the form of a semi-criminal action against him, so much so that in the event the judgment were annulled, the erring judge was open to the payment of damages to the prevailing party.

Hopkins, *Small Sparks from a Low Fire: Some Reflections on the Appellate Process*, 38 BROOKLYN L. REV. 551, 553 (1972).

209. *See* United States v. Nixon, 418 U.S. 683, 709 (1974) (citing need to protect "integrity of the judicial system and public confidence in the system"); 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND * 390 (stating that "next to doing right, the great object in the administration of public justice should be to give public satisfaction"); Leflar, *Observations*, *supra* note 147, at 812 (stating that a "major function of any system of law is to assure its own acceptance in the society it governs").

210. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)) (emphasis added).

211. Jacobson, *The Arizona Appellate Project: An Experiment in Simplified Appeals*, 23 UCLA L. REV. 480, 482 (1976); *see also* STANDARDS RELATING TO APPELLATE COURTS § 3.30 commentary, at 46 (1977) (stating that "authority of an appellate court and its enjoyment of public confidence depend chiefly on the fairness with which it is perceived to act"). As others have stated:

> While appellate justice has impact on the realities of situations, it also affects the appearances and symbols which pervade the government. An appellate system which is unduly preoccupied with one of these functions to the neglect of the other, is inadequate to advance the purposes which appellate courts should serve.

P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 82, at 3.

tion of appellate review. Despite the appellant's belief that the district court has made a mockery of fair play, the district court decision gains the stamp of appellate approval simply because it has been issued by the district court judge. The appellant, moreover, learns of this reasoning through a written appeals court opinion that is probably the appellant's only point of contact with the appellate court.[212] An aggrieved party may find such logic callous, if not conspiratorial. Rather than providing solace, the appellate opinion may inspire the appellant's conclusion that the deck was stacked on appeal as well as at trial. The rule of deference thus undermines the important "legitimating" purpose of appellate review. That fact speaks forcefully against the rule.[213]

B. THE RULE OF DEFERENCE AND MODERN JURISPRUDENCE

The judicial function is clear in "easy" cases. Judges in such cases follow clear statutory or case law pronouncements. The nature of the judicial function is more difficult to describe, however, in those many "hard" cases not readily resolved by pre-existing rules or precedent. Jurisprudential theorists have asserted two main theories in the last century to explain how judges decide hard cases. These theories, moreover, shed light on the wisdom of the rule of deference.[214]

The "rights" theory of law, recently championed by Ronald Dworkin, posits that judges should and do decide hard cases based on transcendent principles rooted in law and tradition, rather than on personal policy preferences.[215] This vision of

212. *See* STANDARDS RELATING TO APPELLATE COURTS § 3.30 commentary, at 47 (1977) (noting that "essential functions of an appellate court are . . . beyond the reach of effective outside scrutiny [and, therefore], it is important that the visible manifestations of an appellate court's decisional process indicate it is being properly performed").

213. Appellate courts sometimes follow abbreviated review procedures in particular classes of cases. Application of the rule of deference in state law civil cases is arguably a proper variation on this theme. The classes of cases in which courts often dispense with the trappings of full review, however, are social security and habeas corpus claims. In these cases, litigants' claims already will have passed through multiple levels of governmental review. Such prior review provides both a structural check on accuracy of result and a substantial legitimization of the initial governmental decision. These factors simply are not present in the typical federal diversity case.

214. This "jurisprudential" discussion is intentionally brief, because this Article concerns the rule of deference rather than legal philosophy. Even so, this discussion helps demonstrate that jurisprudential observations can shed light on practical legal questions.

215. *See* Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1059 (1975).

proper judging clashes with the rule of deference. Indeed, it seems difficult to identify a rule less hospitable to transcendent "principle" than one which relies solely on how a particular lower court judge chooses to rule. The Dworkin approach also deems the value of "treating like cases alike as fundamental."[216] It seems apparent, however, that courts embracing the rule of deference, at least in its broadest forms, are willing to allow like cases to come out differently even in the very same court. Defenders of the rule might respond that such "like" cases, although otherwise identical, are in fact different cases for the very reason that the lower courts reached different results in them. To draw this distinction, however, is to say only that the cases are different because the litigants drew different trial judges. Such a view travels far from the usual conception of distinguishable cases and clearly seems to clash with Dworkin's own definition of the "like cases" principle.[217]

Alternatively, according to the "lawmaking" theory of the judicial function, advocated by "realists" and "positivists," judges "legislate" or "make law" when confronted with hard cases.[218] Under this theory, judges often make decisions based on their own view of fairness and sound policy[219] because the

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216. *Id.* at 1090.

217. For example, Dworkin notes that the "like cases" principle "requires government . . . to extend to everyone the same *substantive* standards of justice and fairness it uses for some." R. DWORKIN, LAW'S EMPIRE 165 (1986) (emphasis added).

218. *See, e.g.*, Southern Pac. Co. v. Jenson, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (stating that "judges do and must legislate"); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-13 (1921) (stating that judges legislate "only between gaps"); J. GRAY, THE NATURE AND SOURCES OF THE LAW, ch. X (2d ed. 1921) (recognizing that judges make law); D. KARLEN, *supra* note 129, at 67 (arguing that Supreme Court frankly recognizes its law making function); A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 470 n.* (1956) (stating that "the problem is not whether the judges make the law, but when and how and how much" (quoting memorandum from Justice Felix Frankfurter to Justice Hugo Black)); Corbin, *supra* note 186, at 773 (noting that "[m]ost judges have, in the past, strenuously denied that they made the law . . . [but] they and most critical jurists have now abandoned this denial"); Fox, *Law and Fact*, 12 HARV. L. REV. 545, 548 (1899) (observing that "judicial legislation . . . is inherent in the strict performance of judicial duty"); Leflar, *Sources*, *supra* note 147, at 323 (stating that courts "have made most of the law that we have"); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 476 (1977) (noting that "the view that judges only 'find' and do not 'make' the law" is not often argued).

The literature exploring this terrain is, of course, expansive. It is associated with legal positivists, legal realists and, most recently, proponents of the critical legal studies movement.

219. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, *supra* note 82, at 3

language of preexisting authorities is imprecise,[220] because the legal materials incompletely identify and prioritize applicable moral and social values,[221] and because the law has many cross-currents.[222] The lawmaking process, as interpreted by propo-

(recognizing "creative and political aspects" of judicial decisionmaking); J. HOWARD, *supra* note 15, at 166-67 (noting that "[w]hen judges are free to choose, personalities, predilections, and group relations perforce fill the void"); Carrington, *supra* note 82, at 518 (stating that judicial lawmaking requires a "varied mix of value judgments about conflicting social policies and procedural practices"); Hopkins, *Public Policy and the Formation of a Rule of Law*, 37 BROOKLYN L. REV. 323, 332 (1971) (discussing way in which judges determine public opinion); Kaplan, *Do Intermediate Appellate Courts Have a Lawmaking Function?*, 70 MASS. L. REV. 10, 12 (1985) (stating that making law involves deciding "by analogy, by historical or philosophic reflection, by intuition"); Schaefer, *The Appellate Court*, 3 U. CHI. L. SCH. REC. 1, 13 (Issue 2, 1953) (stating that "cases are decided . . . in that area of policy and in the considerations out of which the black-letter rules evolve"); Traynor, *supra* note 147, at 219 (stating that when "courts must revise old rules or formulate new ones, . . . policy is often an appropriate and even a basic consideration"); Vestal, *supra* note 82, at 385 (stating that "[d]ecided cases[;] [t]he relevant factual situation; the personal predilections of the judge; the impact of society; and other seen and unseen factors play a part" in decisions).

220. *See* Kotteakos v. United States, 328 U.S. 750, 761 (1946) (observing that "[t]he discrimination [the statute] requires is one of judgment transcending confinement by formula or precise rule"); A. DERSHOWITZ, *supra* note 122, at 41 n.* (stating that "[c]ourts love to use imprecise metaphors such as 'taint' and 'fruit' because of their inherent ability to expand or contract with the context, which accords the judges broad discretion in applying them to specific situations"); J. HOWARD, *supra* note 15, at 15 (arguing that "much discretion may be veiled behind legal categories that appear to routinize decisions").

221. B. CARDOZO, *supra* note 218, at 17, 21 (observing that in "vacant spaces" in which "there is no decisive precedent, . . . the serious business of the judge begins"); J. HOWARD, *supra* note 15, at 10 (stating that federal judges "have become surrogate lawmakers in the vacuums of public choice"); W. REHNQUIST, *supra* note 79, at 291 (calling law "an inexact science"); Hart, *supra* note 180, at 505 (noting that "the wisest of judges would differ upon such questions"); Kaplan, *supra* note 219, at 10 (describing broad "indeterminacy" that proponents of legal realism and critical legal studies perceive in law); Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 927 (1960) (observing that complexities of modern life make impossible "reduction to rules of everything with which the regime of justice according to law must deal"); Traynor, *Law and Social Change in a Democratic Society*, 1956 U. ILL. L.F. 230, 232 (1956) (observing that "in those cases where there is no stare decisis to cast its light or shadow, the courts must hammer out new rules").

222. *See* K. LLEWELLYN, THE COMMON LAW TRADITION 12 (1960) (citing "large numbers of mutually inconsistent major premises available"); Corbin, *supra* note 186, at 776 (arguing that "conflicts between judges on a single bench in the same case, or between a court and its predecessors on the same court . . . [are] an inevitable part of our judicial process, or of any other").

In addition, judges may "legislate" because law and tradition give them substantial freedom to alter preexisting rules. Fox states: "The assumption too that the courts have any special mission to 'declare the law' is contradicted

nents of this view, is confined somewhat in federal diversity cases because federal judges are duty-bound to follow state law rules whether or not they believe them sound.[223] Nevertheless, diversity cases often arise in which preexisting rules do not point clearly to the correct result.[224] It follows, according to this lawmaking vision of judging, that resort to value judgments is inevitable and appropriate in hard state law cases.[225]

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in every volume of our reports. The courts are constantly enlarging, cutting down or denying altogether rules, which have been stated in earlier cases, and they do it with entire freedom." Fox, *supra* note 218, at 548; *see also* Traynor, *supra* note 221, at 232 (stating that courts must be creative "when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions.").

223. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941) (stating that "the proper function of the . . . federal court is to ascertain what the state law is, not what it ought to be"); 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 14, § 4507, at 103 (discussing federal court application of state law); *supra* note 40 and accompanying text.

224. *See, e.g.*, McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 661 (3d Cir.) (noting that there are "few instances in which the highest state court has recently spoken to the precise question"), *cert. denied*, 449 U.S. 976 (1980); 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 14, § 4507, at 89 & n.30 (stating "the federal court must determine issues of state law as it believes the highest court of the state would determine them, not necessarily . . . as they have been decided by other state courts in the past"); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 293 (1946). The causes of indeterminacy in law apply to state law as well as to federal law. Moreover, judges and courts can disagree subjectively over how much play to give earlier judicial pronouncements.

225. *See, e.g., McKenna*, 622 F.2d at 662 (recognizing that federal courts should act "with an eye toward the broad policies that informed" earlier state decisions); Memphis Dev. Found. v. Factors Etc., Inc., 616 F.2d 956, 958 (6th Cir.) (stating that in case of first impression, court is "left to review the question in the light of practical and policy considerations . . . and certain moral presuppositions"), *cert. denied*, 449 U.S. 953 (1980); Petersen v. Klos, 426 F.2d 199, 203 n.16 (5th Cir. 1970) (declaring that if all else fails, "court may assume that the state courts would adopt the rule which, in its view, is supported by the thrust of logic and authority"); Stool v. J.C. Penney Co., 404 F.2d 562, 563 (5th Cir. 1968) (same); Hartness v. Aldens, Inc., 301 F.2d 228, 229 (7th Cir. 1962) (finding state statute "not against good morals or natural justice"); Ohio Casualty Ins. Co. v. Smith, 297 F.2d 265, 266 (7th Cir. 1962) (applying public policy rather than contrary state law); Socony-Vacuum Oil Co. v. Continental Casualty Co., 219 F.2d 645, 647 (2d Cir. 1955) (asserting that court's task entails "weighing the comparative reasoning of learned authors and conflicting judicial decisions for their intrinsic soundness"); Daily v. Parker, 152 F.2d 174, 177 (7th Cir. 1945) (stating that court is "free to take the course which sound judgment demands"). Professor Corbin states:

> Our judicial process is not mere syllogistic deduction, except at its worst. At its best, it is the wise and experienced use of many sources in combination—statutes, judicial opinions, treatises, prevailing mores, custom, business practices; it is history and economics and sociology, and logic, both inductive and deductive. Shall a litigant, by the acci-

The lawmaking vision of law, like the rights-based vision, affects significantly the evaluation of the rule of deference because a central function of multi-judge review is to control judicial subjectivity.[226] Multi-judge decisionmaking mitigates idiosyncrasy and individual policy preference through such institutional mechanisms as consultation and majority vote.[227] A multi-judge appellate process, although subjective, is at least carefully subjective. Multi-judge decisionmaking thus provides a valuable double check against the unwise exercise of judicial discretion that positivists and realists deem inevitable.[228]

In short, because judges operate with broad discretion, judicial structures should minimize the dangers of judicial subjectivity.[229] The rule of deference, however, fosters acceptance of

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dent of diversity of citizenship, be deprived of the advantages of this judicial process?

Corbin, *supra* note 186, at 775; *see also*; New England Mut. Life Ins. Co. v. Mitchell, 118 F.2d 414, 420 (4th Cir.) (citing goal "of reaching the decision which reason dictates" in light of state's common law), *cert. denied*, 314 U.S. 629 (1941); Comment, *The Problem Facing Federal Courts Where State Precedents are Lacking*, 24 TEX. L. REV. 361, 365 (1946) (arguing that federal courts should combine "the elements of justice, policy, and expediency").

Indeed, the *Erie* doctrine may *require* federal courts freely to consider policy, just as a state court would, because a federal court in a diversity case is "in effect, only another court of the State." Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945). Thus,

> [the] court must determine the applicable law by recourse to all the juristic data that are available to the state court. If the federal judge is required to disregard some of those available data, the litigant is not getting the same justice that he would get if the forum were a court of the state.

Corbin, *supra* note 186, at 774.

226. *See supra* notes 142-46 and accompanying text.

227. *See id.*

228. *See* Louis, *supra* note 78, at 1014 (arguing that "[w]ithout voting colleagues to provide checks and balances, even the best trial judges will sometimes make aberrational decisions that only free review can unfailingly correct"). In the United States the right to appeal long has been broader than in England; one observer explains this phenomenon "perhaps as a result of a distaste for the exercise of power by a single authority." Hopkins, *supra* note 208, at 553. Another observer, defending the rule of deference, argues that district court judges should have a better "feel" or "intuition" about state judicial processes "than appeals courts who bring the cold objectivity of ignorance to the task." Woods, *supra* note 70, at 759. Woods contends that a " 'fourth dimension' of legal reasoning, which involves the relationship of transcendental values such as truth and justice to traditional legal relationships" supports the rule. *Id.* at 756. The precise meaning of this argument is elusive. It recognizes, however, the importance of "feel," "truth," and "justice" in state law decisionmaking. The need for the safeguards of multi-judge review seems most acute in this context.

229. *See* Baumgartner v. United States, 322 U.S. 665, 671 (1944) (stating that deference to lower courts is not appropriate "where a decision here for

a single judge's point of view. As a result, the rule clashes with a central message of modern legal scholarship.[230]

C. THE RULE OF DEFERENCE AND RESULTING ANOMALIES

The rule of deference also creates the risk of anomalous results. For example, although the Second Circuit covers the states of Connecticut, New York, and Vermont,[231] the large majority of state law cases that the circuit court decides present questions of New York law.[232] Even in these circumstances, however, the rule of deference treats federal district court judges in New York, but not Second Circuit judges, as experts in New York law. Under this rigid analysis, the rule of deference would apply even if one,[233] two,[234] or all three[235] members of the Second Circuit panel were experienced New York lawyers. The rule would apply even if the New York lawyers on the panel were experienced state court litigators, while the district court judge had practiced only as an antitrust specialist. The rule would apply even if a panel member previously served as a federal district court judge sitting in New York,[236] as a

review cannot escape broadly social judgments"); *see generally* Cohen, *The Process of Judicial Legislation*, in LAW AND THE SOCIAL ORDER 112, 128 (1933) (arguing that substantive law evolves from procedures).

230. Even with Dworkin's approach, judges seeking to discern governing principles must make "judgments about complex issues" that "will inevitably differ from those other judges would make." Dworkin, *supra* note 215, at 1095. Indeed, the "impact of . . . judgments will be pervasive," *id.*, and such judgments will reflect the judge's "own intellectual and philosophical convictions," *id.* at 1096; *see also id.* at 1101 (observing that decisions about legal rights depend upon judgments of political theory that might be made differently by different judges). It follows that the basic point made here—that circuit courts should monitor the substantial discretion exercised by district court judges deciding legal questions—applies to the rights model as well as the law-making model of judicial decisionmaking.

231. UNITED STATES COURT OF APPEALS (2D CIR.) SECOND CIRCUIT REPORT 1987 vii.

232. *See id.* at 16 (of 19,375 civil cases filed in Second Circuit district courts in 1987, fewer than 2800 were filed in Connecticut and Vermont districts).

233. *See, e.g.*, Thurston v. Mack Co., 716 F.2d 255, 255 (4th Cir. 1985); Robertshaw Controls Co. v. Pre-Engineered Prods., Co., 669 F.2d 298, 300 (5th Cir. 1982); Cole v. Elliott Equip. Corp., 653 F.2d 1031, 1054 (5th Cir. 1981).

234. *See, e.g.*, Bagwell v. Canal Ins. Co., 663 F.2d 710, 712 (6th Cir. 1981) (applying rule of deference in Tennessee case even though Judges Brown and Phillips both practiced in Tennessee).

235. *See, e.g.*, O'Rourke v. Eastern Air Lines, 730 F.2d 842, 847 (2d Cir. 1984) (citing rule of deference in New York case even though Judges Mansfield, Pratt, and Tenny all rose to the bench after practicing in New York).

236. *See, e.g.*, Rabon v. Guardsmark, Inc., 571 F.2d 1277, 1280 (4th Cir.) (citing rule of deference in South Carolina case even though Judge Russell spent

New York state trial judge,[237] or as a judge on New York's highest court.[238] Finally, the rule would apply even if the panel member had served in that capacity for ten years and the district court judge had ascended just recently to the federal bench.[239] These hypotheticals are not far-fetched; indeed, for all practical purposes, they are not hypotheticals at all.[240]

Application of the rule of deference seems illogical in most of these situations. In fact, the circuit courts sometime have avoided such anomalous results by recognizing exceptions to the rule.[241] Addressing these problems by creating exceptions to the rule, however, merely flips the circuit court from the frying pan into the fire. An exception-based solution, for example, calls for unseemly "judge-rating"—that is, an examination whether specific judges, based on experience or specialization of practice, deserve the usual measure of deference.[242] It also requires careful identification and application of proper exceptions, a process likely to take up the very appellate court time that the rule of deference is designed to preserve. Most fundamentally, an exception-based approach focuses attention on such matters as the district court judge's background, thus diverting attention from the actual merits of the case. For all these reasons, an exception-based "cure" for the problem of anomalous results seems even worse than the disease.

Of course, some rules that breed odd results persist because

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five years as district court judge in South Carolina), *cert. denied*, 439 U.S. 866 (1978).

237. *See, e.g.*, Anderson v. Marathon Petroleum Co., 801 F.2d 936, 938 (7th Cir. 1986) (applying rule even though Judge Bauer served as trial court judge in Illinois); Randolph v. New England Mut. Life Ins. Co., 526 F.2d 1383, 1385 (6th Cir. 1975) (citing rule even though Judge Peck previously served as Ohio Common Pleas Court judge on state supreme court).

238. *See, e.g.*, Smith v. Mobil Corp., 719 F.2d 1313, 1317 (5th Cir. 1983) (applying rule although Judge Tate was nine-year veteran of Louisiana Supreme Court and also spent 16 years on Louisiana appellate court); *Randolph*, 526 F.2d at 1385; Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967) (applying rule although Judge Coleman previously was member of Mississippi Supreme Court).

239. *See, e.g.*, Acree v. Shell Oil Co., 721 F.2d 524, 525 (5th Cir. 1983) (applying rule even though Judge Tate, who participated in previous similar case, was member of panel reviewing decision of district court judge with only three years on federal bench).

240. *See supra* notes 233-39.

241. *See supra* text accompanying notes 58-66; *infra* text accompanying notes 757-78.

242. *Cf. In re* Big River Grain, Inc., 718 F.2d 968, 970 (9th Cir. 1983) (declining to defer to district judge's conclusions where bankruptcy judge reached opposite decision on issue concerning state debtor-creditor law).

no appealing alternatives exist.[243] This is not true in the case of the rule of deference. In *In re McLinn*, the Ninth Circuit majority noted that "[t]here is a very real distinction between *deferring to the conclusions* of the district judge, as opposed to *considering the reasoning* of the district judge with the respect that is certainly due."[244] The court observed that a circuit court's "determination should not be based upon some undefined special knowledge or feeling for the state law that the district judge may be presumed to have, but that cannot be articulated by the judge, argued by the parties or reviewed by the appellate court."[245] Rather, the proper focal point for "deference" is the "reasoning and persuasiveness of the judge's decision, which is always entitled to careful consideration."[246]

Stated more simply, if the district court decision reveals expertise in the relevant area of state law, circuit court "deference" is appropriate. If the district court's decision does not evidence such expertise, then a circuit court may infer that the district court has no special expertise. Critics cannot attack such a "proof-in-the-pudding" orientation as unworkable, because it is precisely the approach that appeals courts use in every other kind of case. This approach, moreover, would encourage careful district court opinions by focusing attention on quality of analysis.[247] Most importantly, this approach would measure *genuine* district court expertise in a *rational* fashion, while removing the anomalous results that a generalized rule of deference creates.

D. PRECEDENT AND THE RULE OF DEFERENCE

Perhaps the rule of deference should survive "because it is there." Defending the rule of deference on stare decisis grounds, however, is difficult. First, the full body of precedent, especially in some circuits, stands at least as much against the rule of deference as for it.[248] Even if precedent firmly sup-

243. *See, e.g.*, J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 6-7, at 285-86 (3d ed. 1988) (considering unappealing alternatives to Uniform Commercial Code treatment of damage recovery in anticipatory repudiation cases).

244. 739 F.2d 1395, 1401 (9th Cir. 1984) (en banc) (emphasis in original).

245. *Id.* at 1400.

246. *Id.*

247. *See id.* at 1403.

248. The rule frequently is *not* cited in circuit court decisions on state law. For example, a comprehensive look at the rule of deference has revealed only five cases citing the rule of deference in the Second Circuit, *see infra* text accompanying note 353, even though that court has decided dozens of cases involving state law in just the past few years, *see supra* note 54. Moreover, even

ported the rule, however, courts would be fully justified in reexamining its propriety.

The basic justification for stare decisis is "the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise."[249] In particular, courts are concerned that ready rejection of precedent will disrupt "primary activity" and "the settlement of disputes without resort to the courts."[250]

In addition, many of the policies cutting against presumptive deference—such as maintaining public confidence in the judiciary,[251] achieving individual justice,[252] and avoiding anomalous and inconsistent results[253]—counsel openness to reconsidering the rule's propriety. As the Supreme Court observed: "a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy."[254] It is unlikely that anyone would be prejudiced unfairly if the courts abandoned the rule. Moreover, settled law *requires* courts to reconsider judicial rules that are based upon outdated factual predicates,[255] and there is reason to believe that the rule's basic premise of superior district court expertise has eroded in recent decades.[256]

In sum, the rule of deference is a judicial creation that

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those circuits that apply the rule more often neglect to cite the rule in many cases. *See id.*

249. Moragne v. State Marine Lines, 398 U.S. 375, 403 (1970).

250. *Id.*

251. *See supra* text accompanying notes 206-13.

252. *See supra* text accompanying notes 182-86.

253. *See supra* text accompanying note 185.

254. Moragne v. State Marine Lines, 398 U.S. 375, 405 (1970).

255. Funk v. United States, 290 U.S. 371, 382 (1933) ("questioning whether it is not the duty of the court, if it possess the power, to decide in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past"); *see also* Trammel v. United States, 445 U.S. 40, 48 (1980) (quoting Francis v. Southern Pac. Co., 333 U.S. 445, 471 (1948) (Black, J., dissenting) (stating that "[w]hen precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it")).

256. The information explosion and occupational specialization that mark law practice today did not exist in 1943, when the rule of deference first found acceptance. In that era, for example, many judges and lawyers plausibly could review all the advance sheets generated by their state's appellate courts. Such an effort may have produced the sort of background expertise that the rule of deference attributes to district court judges. It is an extraordinary lawyer, however, who undertakes such an effort today.

courts of appeals may and should reexamine. The above considerations provide ample reason for rejecting the rule as an unwise and unacceptable principle of the common law.

IV. *ERIE* AND THE RULE OF DEFERENCE

The attack mounted on the rule of deference in sections II and III of this Article proceed from the assumption, apparently shared by those courts that have endorsed deferential review, that assessing the rule is properly a question of federal common law. The case against the rule of deference, however, goes beyond conventional common-law analysis. The rule faces a doctrinal, and even constitutional, challenge based on the landmark case of *Erie R.R. Co. v. Tompkins*.[257]

A. THE *ERIE* ARGUMENT AGAINST THE RULE OF DEFERENCE

Before *Erie*, federal courts applied federal common law, rather than state law, when deciding diversity cases.[258] The federal common-law approach, however, created serious problems. It vested federal courts with broad powers to regulate in-state conduct,[259] it subjected state residents to inconsistent governmental regulation and unequal justice in the event of the "accident of a suit by a non-resident litigant,"[260] and it facilitated forum shopping when the plaintiff and defendant resided in different states.[261] In *Erie*, the Supreme Court dealt with these problems by holding that state "substantive" law governs in federal diversity cases.[262]

Early post-*Erie* decisions suggested that state law was "substantive" whenever it could "substantially affect the enforce-

257. 304 U.S. 64 (1938). Commentators have debated vigorously whether *Erie* states a rule of constitutional law. *See* C. WRIGHT, *supra* note 15, § 56, at 360-62 & nn.15-16 (collecting contesting literature). As Professor Wright notes, however: "The fact is that the Court made a considered statement that it would not overrule Swift v. Tyson if only a question of statutory construction were involved, and that it was overruling that decision only because it was inconsistent with the Constitution of the United States." *Id.* at 363.

258. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

259. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting).

260. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

261. *See Black & White Taxicab*, 276 U.S. at 521.

262. *See Erie*, 304 U.S. at 78. Of course, careless use of the labels *substance* and *procedure* may result in misguided *Erie* analysis. *See Guaranty Trust*, 326 U.S. at 108-10; C. WRIGHT, *supra* note 15, § 59, at 378. Nevertheless, this shorthand distinction remains "widely used," *id.* at 377, even by the United States Supreme Court, *see* Hanna v. Plumer, 380 U.S. 460, 465 (1965).

ment of the right as given by the State."[263] More recent cases have adopted a subtler, multi-factored approach for deciding whether to characterize legal rules as "substantive" or "procedural."[264] Under either approach, however, an *Erie* question arises whenever a federal court in a state law case is invited to apply a rule not applied in state court.

The *Erie* problem presented by the rule of deference is not mysterious. The state appellate courts do not afford special deference to trial court rulings on state law; state appellate review ordinarily proceeds de novo.[265] Federal appeals courts applying the rule of deference, however, depart from traditional de novo review by affording special weight to the trial court's state law conclusions. Because the rules of decision in the state and federal systems differ in this significant way, the *Erie* doctrine rears its head.

Adherents to the rule of deference may argue that *Erie* does not invalidate the rule. The underlying purpose of *Erie*, the argument goes, is to ensure that "the *outcome* of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of litigation, as it would be if tried in a State court."[266] The purpose of the rule of deference, the argument continues, comports exactly with the purpose of *Erie*. Courts of appeals, according to the "superior decisionmaker" and "collaborative review" rationales, afford deference to district court judges precisely because such deference produces the most accurate predictions of state law on appeal.[267] The rule cannot offend *Erie* when its raison d'etre is to achieve the goal of *Erie*.

This argument, however, simply brings us full circle. As the analysis above demonstrates, there is good reason to conclude that the rule of deference more often *reduces* the chances that litigants will obtain the best reading of state law.[268] Assuming this factual premise is correct, then the rule of deference clashes with the guiding principle of *Erie*. Because state

263. *Guaranty Trust*, 326 U.S. at 108-09.

264. *See, e.g., Hanna*, 380 U.S. at 467 (requiring "reference to the policies underlying the *Erie* rule," rather than "application of any automatic, 'litmus paper,' criterion"); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 538 (1958) (requiring balancing of federal and state interests).

265. *See supra* notes 76-83 and accompanying text.

266. *Guaranty Trust*, 326 U.S. at 109 (emphasis added).

267. *Cf. supra* notes 41-42 and accompanying text (discussing supposed state law expertise of district court judges).

268. *See supra* notes 128-67 and accompanying text.

appellate courts do not apply the rule, state court litigants have a greater chance that an appellate court will correct an error of law than do litigants who find themselves in federal court. It follows that quality of decisionmaking will differ, both in the run of cases and in individual cases, based solely on the "accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away."[269]

Defenders of the rule of deference might respond that the rule is one of "procedure," and therefore not subject to the strictures of *Erie*.[270] This claim, however, seems unpersuasive. Modern efforts to draw the line between rules of substance and rules of procedure for purposes of *Erie* focus on four considerations: equal administration of law; the state interest underlying the state rule; the federal interest in applying the federal rule; and the rule's effect on forum shopping.[271] If, as earlier analysis suggests, the superior decisionmaker and collaborative review rationales are unsound, then the rule of deference stands on shaky ground when judged according to this four-pronged analysis.

First, application of the rule of deference discriminates against appellants in federal court and, in at least some cases, this discrimination will be outcome-determinative.[272] Second, because meaningful multi-judge review is part of the state's design for deciding appeals involving its citizens and its laws, application of the rule frustrates an important state interest.[273] Third, the rule advances no legitimate federal goal for *Erie* purposes. The only plausible federal interests supporting the rule are to reduce costs in state law cases and to benefit federal law litigants by affording them greater appellate court attention.[274] Unlike in other cases in which federal courts upheld distinctive federal rules against *Erie* attack, these justifications

269. *Guaranty Trust*, 326 U.S. at 109.

270. *See supra* note 262 and accompanying text.

271. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 536-38 (1958); *see generally* C. WRIGHT, *supra* note 15, § 59, at 386 & n.55 (collecting cases that employ interest-balancing approach).

272. *See supra* note 16 and accompanying text.

273. In addition, as argued earlier, the rule of deference undermines the "legitimating" function of appellate review wholly apart from whether it alters results in individual cases. It follows that the rule of deference may frustrate state policy even if the rule has only a minimal outcome-determinative effect. This, in turn, frustrates the goal of *Erie*, because "[t]he essence of diversity jurisdiction is that a federal court enforces State law *and State policy*." Angel v. Bullington, 330 U.S. 183, 191 (1947) (emphasis added).

274. *See supra* notes 169-72 and accompanying text.

do not serve even to foster a "[u]niformity of procedure among the federal courts."[275] Instead, they reflect rank discrimination against state law cases and litigants, in contravention of *Erie*'s fundamental goal of safeguarding "our federalism."[276] Finally, while the rule's effect on forum selection is probably minimal, it may surface in some cases.[277] In any event, the Supreme Court has recognized that *Erie* may require adherence to a state law rule even absent a forum-shopping effect.[278] In sum, courts that reject the superior decisionmaker and collaborative review rationales should reject the rule of deference under *Erie* as well.

Some courts, of course, may hesitate to reject the superior

275. C. WRIGHT, *supra* note 15, § 59, at 382; *see* Hanna v. Plumer, 380 U.S. 460, 472-73 (1965) (quoting Lumbermen's Mut. Casualty Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963), which noted legitimate federal interest in "bring[ing] about uniformity in the federal courts").

276. Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945); *see also id.* at 109 (stating that *Erie* doctrine "touches vitally the proper distribution of judicial power between State and federal courts"); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938) (holding that "lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States"). In addition, these justifications are, at bottom, based on a lack of federal court resources. In other contexts, however, federal concern for securing administrative economies may not override powerful constitutional interests. *See* L. TRIBE, *supra* note 80, § 16-6, at 1453. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), provides a useful counterpoint in assessing the federal interests supporting the rule of deference. There, the Court bowed to "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts," 356 U.S. at 538, an "essential characteristic" of the federal system emanating from "the influence of the Seventh Amendment," *id.* at 539. No such federal interest underlies the rule of deference. *See* Note, *The Ascertainment of State Law in a Federal Diversity Case*, 40 IND. L. J. 541, 552 (1965) (stating that "*Byrd* doctrine applies only in the exceptional circumstances where a state rule that could make some substantial difference in the outcome of the case is opposed by a strong federal policy").

277. The rule of deference should have little influence on forum selection because litigants choosing a forum seldom will focus on rules of appellate practice. This is especially true when, as with the rule of deference, the effect of the appellate rule depends on the result in the trial court. Nevertheless, the rule of deference conceivably could affect the choice of forum in some instances. If, for example, a litigant perceived a good chance of securing a sympathetic trial judge in both state and federal court, the rule of deference might dictate choosing the federal forum. *See* Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (stating that "litigants often choose a federal forum . . . to try their cases before a supposedly more favorable judge"). Thus, even defenders of the rule cannot dismiss entirely the forum-shopping effect of the rule of deference.

278. Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980); *see also* Hart, *supra* note 180, at 513 (noting that "the undesirability of affording any incentive for forum-shopping" was in *Erie* itself "a relatively minor consideration which Brandeis mentioned only in passing").

decisionmaker and collaborative review rationales. It is, they may reason, impossible to say with certainty that deferential review produces less accurate results in state law cases, especially when a circuit court applies a less aggressive version of the rule of deference. Supreme Court decisions suggest, however, that the rule of deference contravenes *Erie* even if courts do not reject outright the superior decisionmaker and collaborative review rationales. Four distinct lines of Supreme Court authority support this conclusion.

First, in *Wichita Royalty Co. v. City National Bank*,[279] the Court said that the court of appeals in a diversity case is "substituted" for the state supreme court, and it therefore must interpret state law as the state's high court "would have declared and applied it."[280] Thus *Wichita Royalty* suggests that a federal appeals court deciding issues of state law should act like the state's supreme court.[281] This conception of the federal courts of appeals seems consistent with *Erie*, given the hierarchical similarities between the federal and state judicial systems. It logically follows, under *Wichita Royalty*, that the federal appellate courts should apply the same de novo review applied by state high courts. At a minimum, federal courts should employ such de novo review absent strong evidence that the rule of deference would produce more accurate results.

Second, in *Palmer v. Hoffman*[282] and *Cities Service Oil Co. v. Dunlap*,[283] the Supreme Court held that state law rules governing presumptions and burdens of proof control in federal diversity cases.[284] The relevance of these rulings is apparent: if rules defining the degree of persuasiveness necessary to prevail at trial are "substantive," such rules are logically substantive at the appellate level as well. Certainly, it is as true on appeal as at trial that "the burden of proof may determine the outcome

279. 306 U.S. 103 (1939).

280. *Id.* at 107.

281. *See also* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956) (holding that "the federal court enforcing a state-created right in a diversity case is . . . in substance 'only another court of the State' "); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949) (holding that "the federal court administers the state system of law in all except details related to its own conduct of business"); King v. Order of United Commercial Travelers, 333 U.S. 153, 161 (1948) (same holding as *Bernhardt*).

282. 318 U.S. 109 (1943).

283. 308 U.S. 208 (1939).

284. *See* C. WRIGHT, *supra* note 15, § 59, at 377.

of the case."[285] To prevail in court, a plaintiff first must identify the legal elements of a cognizable cause of action and then prove facts that establish those elements. Just as increasing the burden of proof for the facts at trial dilutes the state law cause of action, making "proof" of the legal elements more difficult on appeal dilutes the cause of action. In short, when the rule of deference governs, "there is a different measure of the cause of action in one court than in the other," so that "the principle of *Erie* . . . is transgressed."[286]

Third, in *Bernhardt v. Polygraphic Co. of America*,[287] the Court focused directly on the rules defining the scope of judicial review. In *Bernhardt*, the Court held that the federal court in a diversity case must deny arbitration if the state courts would refuse to order arbitration of the dispute.[288] In so holding, the Court observed that "judicial review of an [arbitral] award is more limited than judicial review of a trial."[289] The clear direction of this reasoning is that rules altering the rigor of judicial review, as the rule of deference certainly does, are substantive, rather than procedural. Although the Court's decision in *Bernhardt* also rested on other factors, its specific focus on the intensity of judicial review reinforces the conclusion that the rule of deference is incompatible with *Erie*.

Finally, in *Hanna v. Plumer*,[290] the Supreme Court stated that "[t]he *Erie* rule is rooted in part in a realization that it would be unfair for *the character or* result of a litigation materially to differ because the suit had been brought in federal court."[291] Even if the rule of deference does not alter the overall number of correct federal court decisions, it clearly changes the "character" of appellate inquiries. The state court litigant, in both appearance and fact, receives more rigorous appellate review than the federal court appellant. This discrimination oc-

285. Sampson v. Channell, 110 F.2d 754, 758 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1941).

286. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 533 (1949). This parallel is imperfect because there is no basis at all for arguing that departing from state law jury instructions on burdens and presumptions will, in the broader scheme of things, create a closer fit between state court and federal court results. Yet, absent proof positive that the rule of deference creates a greater consistency in outcomes, settled *Erie* law on burdens and presumptions points toward viewing the analogous rule of deference as a rule of substance, rather than procedure.

287. 350 U.S. 198 (1956).

288. *Id.* at 203.

289. *Id.*

290. 380 U.S. 460 (1965).

291. *Id.* at 467 (emphasis added).

curs precisely because of "the fortuitous circumstance of residence out of a State."[292] Again, supporters of the rule may argue that this discrimination in rules serves the aim of *Erie* by reducing discrimination in results.[293] The discrimination in *rules* is apparent, however, while the alleged nondiscrimination in *results* is at best speculative.[294] In these circumstances, *Erie*'s antidiscrimination rationale should militate strongly against the rule of deference.

B. A CRITIQUE OF THE *ERIE* ANALYSIS—AND A LINE OF DEFENSE.

The preceding *Erie* analysis is not immune from attack. Indeed, at least three separate criticisms of that analysis seem possible. In the end, however, none of these criticisms carries the day.

First, one might argue that *Erie* applies only when federal law and state law conflict on the same legal question. From this viewpoint, the rule of deference presents no *Erie* problem because no state court has considered and rejected the appropriateness of the rule—or even could consider and reject it—because the rule of deference is a distinctively federal principle. The rule was designed to aid only *federal* appellate courts by according special weight to *federal* district court rulings in the specialized context of the *federal* judicial system. Stated a different way, there is no "choice between state and federal law . . . to be made" in this setting[295] because no competing state rule exists.

This argument falters because it ignores the real world. In fact, appellate review in state law cases often differs significantly between state and federal courts because of the rule of deference. State courts, at least in general, afford traditional de novo appellate review to conclusions of law. On the other hand, application of the rule of deference dilutes appellate review in federal court. If, under *Erie,* the local federal court is to sit as "only another court of the State,"[296] such real world differences must matter. It is the *functional* difference between state courts and federal courts adjudicating state law

292. Guaranty Trust Co. v. York, 326 U.S. 99, 112 (1945).
293. *See supra* text accompanying notes 266-67.
294. *See supra* text accompanying note 268.
295. *Hanna,* 380 U.S. at 467.
296. *Guaranty Trust,* 326 U.S. at 108.

cases that raises the *Erie* question, not the technical absence of a conflicting state rule.

The second challenge to the *Erie* analysis in section IV(A) is quite different. According to this line of criticism, an *Erie* attack on the rule of deference violates a general principle that federal law must and does control standard of review and related appellate matters in federal diversity actions. This general principle, the argument goes, finds support in the thousands of federal diversity decisions in which appellate courts, by not inquiring into or mentioning state standard of review rules, indicate at least implicitly that federal law invariably controls this set of issues.

This argument again is unpersuasive, mainly because the existing case law is far less clear than the argument suggests. No cases address broadly whether state or federal law governs the scope of appellate review in the absence of a governing federal rule of civil or appellate procedure.[297] To be sure, a few cases suggest that federal standard of review law should control disposition of certain state law issues presented on the appeal of cases tried in federal court.[298] Other cases, however, point in the opposite direction, suggesting that *state* law should answer important questions about the scope of federal appellate review

297. At least no case has come to the author's attention, despite a substantial effort to unearth one. In addition, neither Professor Moore's treatise nor the Wright, Miller, and Cooper treatise appear to identify any such case, despite the efforts of both treatises to catalogue comprehensively the various *Erie* issues that courts have explored. *See* 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 14, § 4511; 1A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶¶ 0.310, 0.317.

298. *See* Browning-Ferris Indus. v. Kelco Disposal, 57 U.S.L.W. 4985, 4991 (U.S. June 26, 1989) (No. 88-556); Kabatoff v. Safeco Ins. Co. of Am., 627 F.2d 207, 209 n.2 (9th Cir. 1980) (stating in dictum that federal standard of review should apply in reviewing amount of jury damage award on state law cause of action); Felder v. United States, 543 F.2d 657, 663-65 (9th Cir. 1976) (stating same for amount of damages awarded by judge); *see also* LaForest v. Autoridad de Las Fuentes Fluviales de P.R., 536 F.2d 443, 446-47 (1st Cir. 1976) (refusing, in review of jury damages award, to follow Puerto Rican appellate courts' practice of aggressively reviewing judge-made damage awards because of risk of interference with plaintiff's seventh amendment jury-trial right); *infra* note 302 (discussing *Felder v. United States*).

In *Olympic Sports Prods., Inc. v. Universal Athletic Sales Co.*, 760 F.2d 910 (9th Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986), the Ninth Circuit discussed the standard of review in a diversity case and held that federal law controlled. It did so, however, in a single three sentence paragraph in a case reviewing a determination, based on *federal Erie* law, that state law controlled the issue presented. *Id.* at 912-13. Therefore, *Olympic Sports* sheds no light on the *Erie* question presented here.

of district court state law rulings.[299]. These latter cases, together with Supreme Court decisions like *Wichita Royalty* and *Bernhardt*,[300] suggest that the assertion that federal law must *always* control standard of review and related issues is wrong. Indeed, application of such a sweeping proposition to real world cases would not square with the present day focus of *Erie* on accommodating important state interests.[301]

If these points are well taken, then state appellate review

299. *See* LaSalle Nat'l Bank v. Service Merchandise Co., 827 F.2d 74, 78 (7th Cir. 1987) (citing Illinois law for proposition that "whether a contract is ambiguous is a conclusion of law and may be reviewed *do novo* by the court on appeal"); Gibbs v. Air Canada, 810 F.2d 1529, 1533 (11th Cir. 1987) (appearing to follow Florida law in reviewing district court's contract de novo); Air Line Stewards & Stewardesses Ass'n, Local 550 v. American Airlines, Inc., 763 F.2d 875, 878 (7th Cir. 1985) (citing same), *cert. denied*, 474 U.S. 1059 (1986); Bradley Bank v. Hartford Accident & Indem. Co., 737 F.2d 657, 660 (7th Cir. 1984) (applying Wisconsin rule "that, in general, construction of insurance policies is a question of law, which may be redetermined independently on appeal"); *see also* Wisconsin Real Estate Inv. Trust v. Weinstein, 712 F.2d 1095, 1099 (7th Cir. 1983) (applying state law rule to construction of trust instrument); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 783 (9th Cir. 1980) (citing state law for proposition that "determination of whether an allegedly defamatory statement is a statement of fact or a statement of opinion is a question of law"). Some state court decisions also hold that the *federal* standard of review should apply in *state* court actions for enforcement of federal rights. Bowman v. Illinois Central R.R. Co., 11 Ill. 2d 186, 200-02, 142 N.E.2d 104, 114-15 (1957) (holding that federal, not state, standard of review applies in appeal from jury verdict on Federal Employees Liability Act claim); *accord, e.g.*, Jensen v. Elgin, Joliet & Eastern Ry. Co., 15 Ill. App. 2d 559, 560, 147 N.E.2d 204, 212 (1957). These "reverse *Erie*" cases support the view that, at least sometimes, federal courts should apply *state* law standards of review in reviewing claims based on state-created substantive rights. They recognize that federal interests are sometimes sufficiently dominant to warrant displacement of state standard of review rules in state court. It seems to follow logically that state interests may sometimes be sufficiently weighty to displace federal standard of review law in federal court, especially given the focus on interest balancing in modern *Erie* analysis. *See supra* notes 271-78 and accompanying text.

300. *See supra* notes 279-81, 287-89 and accompanying text.

301. Consider, for example, a state statute specifying that no judgment in a medical malpractice action shall be reversed by any appellate court unless extraordinary error in the trial proceedings is shown. Suppose further that the legislative history of this statute stated that:

> This standard of review—far stricter than *de novo* or even abuse-of-discretion review—is proper because of the special need for finality in this distinct set of cases. Empirical evidence shows that drawing out the legal process in such cases is in general detrimental to patients, to doctors, and to the administration of sound medical practice in this state. Thus this statute permits appellate reversals of judgments in favor of both doctors and patients only in truly extraordinary situations.

Surely *Erie* would require federal courts to honor this state legislative judg-

law may, at least in particular instances, displace a competing federal rule. The federal rule of deference, a highly specific and especially unjustifiable rule reflecting a clean break from ordinary state law practice, is one rule that thus should give way.[302]

Finally, it might be urged that the *Erie* argument advanced here proves too much. According to this line of attack, Parts II and III of this Article advocate de novo review, while adherence to state law may require federal courts on occasion to apply state-specific appellate review rules that depart from the de novo standard.[303] This criticism of the *Erie* analysis, however, mistakes the intended message of Parts II and III. Those Parts argue not so much *for* de novo appellate review as *against* a federal common-law rule of deference. Thus, the arguments in those sections are not incompatible with a federal court's applying a nontraditional standard of review for reasons, including *Erie* reasons, not related to the rule of deference.

In reality, the analysis of Parts II and III, advocating abandonment of the rule of deference as a part of federal common law, and section IV(A) which advocates application under *Erie* of state law not embodying the rule of deference, point to exactly the same result in the broad class of cases this Article concerns. The hundreds of opinions citing the rule of deference collected in Appendix I concern without significant exception "pure" questions of law. In these cases, absent the rule of def-

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ment, which rests so clearly on strong state policy, at least absent a contrary federal statute or properly promulgated rule of procedure.

302. It merits emphasis in this regard that, at least in most circuits, the rule of deference does not concern a "true" or "pure" standard of review, but instead simply places an unquantifiable weight on the scale favoring appellate court affirmance. This fact distinguishes rule of deference cases from other cases in which federal appellate courts may feel compelled to apply a federal standard of review rule. In *Felder v. United States*, 543 F.2d 657 (9th Cir. 1976), for example, the court of appeals selected the federal "clearly erroneous" standard of review over the competing "unreasonable and outrageous" state law standard of review in assessing a trial judge's damages award. *Id.* at 664. The appellate court emphasized that "[t]he calculation of damages . . . is a question of fact," and directly cited the clearly erroneous rule of *Federal Rule of Civil Procedure* 52(a) in support of its holding. *Id.* at 663, 664. *Felder* thus may be viewed as properly applying "[t]he first half of the [*Hanna*] test, that a valid Civil rule is to be applied without more." C. WRIGHT, *supra* note 15, § 59, at 383. This line of reasoning, however, falls far short of sheltering the rule of deference from *Erie* challenge. The rule of deference simply does not concern "[f]indings of fact . . . based on oral or documentary evidence," FED. R. CIV. P. 52(a), and thus—unlike the federal rule applied on *Felder*—gains no protection against an *Erie* attack from Rule 52 and "the first half of the [*Hanna*] test."

303. *See supra* note 301.

erence, traditional de novo review ordinarily would apply to both state court and federal court. The central message of this Article is that the rule of deference should be jettisoned in these cases—either as a matter of sound federal common law *or* as an application of *Erie*. Both roads lead to the same place, and there is no apparent reason why the *Erie* route is unavailable.[304]

V. LATENT EXPLANATIONS FOR THE RULE OF DEFERENCE

A complete inquiry into the purposes of the rule of deference must go beyond legalistic rationales like district court expertise, "collaborative review," or cost-benefit analysis. Psychological forces—conscious and subconscious—may account for the continued existence of the rule as much as any previously articulated rationale. A search for these motivations implies no disrespect for judges; instead it recognizes the humanity of judges and the complexity of their work. Careful study has suggested four separate subliminal forces that may contribute to the continued judicial support for the rule of deference.

First, federal judges face an impossible task when they must decide difficult state law cases. Federal law requires federal judges to decide state law issues as a state court would decide them, but often the judges must act without meaningful state law guidance.[305] It is understandable that judges, launched on this uncharted sea, would seek a rudder to help steer their decisional course. The rule of deference may serve this purpose. Satisfaction of an escape impulse, however, is not a sound or sufficient justification for an important judicial rule. Indeed, as mentioned earlier, district court judges faced with

304. In addition, even if an appellate court decided preliminarily that *Erie* does not support displacement of the rule of deference, the arguments developed in section IV(A) remain significant. Thus, whether or not *Erie* directly controls, it is entirely appropriate for a federal court, in settling on the proper federal common-law rule, to consider that rejection of the rule of deference generally will promote the *valid policy concerns* underlying *Erie*, including the recognized interest in equal administration of the law. Similarly, acceptance of the *Erie* analysis developed in section IV(A) does not render irrelevant the federal common-law analysis developed in Parts II and III. Indeed, it is the analysis in Parts II and III that compels the application of state law de novo review under *Erie*, both by identifying the strong state interests favoring application of state law de novo review and by revealing the absence of a valid federal interest that justifies the rule of deference.

305. *See supra* text accompanying note 224.

the task of "finding" state law in general will find that task even more "impossible" than do circuit court panels.[306] The subjective nature of finding state law also heightens the need for meaningful multi-judge review.[307] In short, "[a]lthough some have characterized this assignment as speculative or crystal-ball gazing, nonetheless it is a task which [the courts of appeals] may not decline."[308]

Second, the rule of deference may reflect an underlying hostility toward diversity jurisdiction. Many commentators have advocated elimination of diversity jurisdiction.[309] Moreover, some judges—particularly appeals court judges—may view diversity cases as "second-class" lawsuits because they produce only tentative rulings that state courts, in effect, can reverse.[310] Hostility toward diversity jurisdiction, however, cannot legitimately support the rule of deference. Even if diversity cases are in some sense "second-class" cases, the parties to those suits are not second-class citizens. The people, through Congress, have entrusted diversity cases to the federal courts; those courts may not give short shrift to diversity cases because they involve "only" state law issues.[311]

Third, "territorial" concerns may undergird the rule of deference. Adoption of the rule gave district court judges greater power. Undoing the rule will reclaim that power for the courts of appeals. Thus, district courts might perceive circuit court abolition of the rule of deference as a slap, a snub, or a power-grab.[312] Circuit court judges considering the propriety of the rule might anticipate such reactions. This problem is magnified

306. *See supra* text accompanying note 135.

307. *See supra* text accompanying notes 142-46, 224-25.

308. McKenna v. Ortho Pharmaceutical Corp., 622 F.2d 657, 661-62 (3d Cir.), *cert. denied*, 449 U.S. 976 (1980); *cf.* Meredith v. Winter Haven, 320 U.S. 228, 234-35 (1943) (stating that federal courts in diversity cases must decide state law issues even if "difficult or uncertain"); Bator, *supra* note 150, at 448 (stating that "[j]ust because a court of appeals cannot assure us that ultimate justice has been done does not mean that trial court determinations should not be reviewed"); *see generally* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (observing that, faced with difficult legal questions, the Court must "exercise our best judgment, and conscientiously . . . perform our duty"); INS v. Chadha, 462 U.S. 919, 944 (1983) (quoting *Cohens*).

309. *See* C. WRIGHT, *supra* note 15, § 23, at 128, 130 & n.16 (citing numerous authorities).

310. *See supra* text accompanying note 174.

311. *See Meredith v. Winter Haven*, 320 U.S. at 234 (stating that diversity jurisdiction's "purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts").

312. *See* Louis, *supra* note 78, at 997 (stating that "[s]cope of review . . . is

because circuit court judges must live and work with district court judges; they are colleagues and often friends who share an ongoing and sensitive superior/subordinate relationship.[313] As a result, circuit court judges weighing the rule may find inaction a natural, and perhaps judicious, solution. Territorial unselfishness, however, provides no sound justification for the rule of deference. Judges cannot sacrifice the rights of individual litigants on an altar of harmonious personal relations.

Finally, circuit court judges may continue to employ the rule of deference on the theory of "no harm, no foul." According to this view, the rule seldom alters results in actual cases. In many diversity cases, for example, the courts of appeals do not cite the rule of deference at all.[314] In other cases, the courts cite the rule yet overturn district court rulings.[315] Therefore, inertia, lack of perceived need, and political concerns may combine to induce appeals courts to leave the rule untouched because they view it as more symbolic than substantive.

This putative rationale for retaining the rule is the most problematic of all. So long as the rule of deference remains law, some courts will apply it to some extent in some cases.[316] Thus, the rule will produce unequal justice. Appellants will suffer at the hands of those judges who take the rule at face value. Judges who view the rule as toothless, on the other hand, will decide cases as though the rule did not exist at all. At the very least, our legal system must strive for intellectual honesty.[317] If the rule of deference is in fact a fiction, then that fiction should be debunked.

It is unclear whether these psychological forces in fact have perpetuated the rule of deference. This Article isolates them only to ease the task of the good judge. Good judges are acutely aware of their fallibility and self-consciously strive to decide issues free of extraneous impulses and concerns. A focused itemization of *possible* biases will ease this task. Careful judges evaluating the rule of deference therefore will inquire

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the principal means by which adjudicative decisional power and responsibility are divided between the trial and appellate levels").

313. *See* Rubin, *supra* note 76, at 448-49.

314. *See supra* note 54 and accompanying text.

315. *See infra* notes 338, 477-78, 609 and accompanying text.

316. *See, e.g., supra* note 16 and accompanying text.

317. *See, e.g.*, United States v. Parker, 2 U.S. (2 Dall.) 373, 379 (Cir. Ct. Pa. 1797); Hopkins, *Fictions and the Judicial Process: A Preliminary Theory of Decision*, 33 BROOKLYN L. REV. 1, 7-8 (1966); Leonard, *supra* note 146, at 333.

first whether any of these forces color their analyses. Only after driving out these demons, or justifying on a reasoned basis their appropriate role in analysis, will the good judge decide whether the rule of deference should persist.

CONCLUSION

There is evidence that the rule of deference is crumbling at the edges. One circuit has abandoned the rule.[318] Others have reined it in.[319] In some circuits the rule lies rusting with disuse.[320] In others, appellate panels have avoided the rule's effect by riddling it with exceptions.[321] These signals point in the right direction.

This Article argues that vague references to district court expertise cannot justify the rule of deference. Courts should reexamine the rule with a broader focus. They should consider the meaning of "district court expertise," explore deficiencies in that rationale, and consider the ill effects that the rule produces. Courts should weigh the rule against the principles of the *Erie* doctrine and consider whether the rule rests more on convenience than on the rule of law. Taken together, these considerations suggest that the rule of deference lacks a sound foundation.

The rule of deference is ripe for rethinking. Many considerations argue against its continued use. The most potent arguments against the rule, however, are the most straightforward and simple. Equal treatment of, and full fairness for, state law litigants in the federal courts of appeals dictate that those courts should abandon the rule of deference.

APPENDIX I

A CIRCUIT-BY-CIRCUIT REVIEW OF THE RULE OF DEFERENCE

This Appendix identifies and reviews more than 550 cases that cite the rule of deference. The cases come from every federal circuit except the Ninth, which rejected the rule of deference in 1984. The Appendix collects and synthesizes that body of authority on a circuit-by-circuit basis. The Appendix also describes the present status of the rule in the Ninth Circuit.

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318. *See supra* text accompanying note 71.

319. *See infra* notes 354-69, 390 and accompanying text (Third Circuit); *infra* notes 605-19 and accompanying text (Eighth Circuit).

320. *See supra* notes 54-55 and accompanying text.

321. *See infra* Appendix II.

The cases collected here reflect an exhaustive and up-to-date search of all sources in the West Digest System annotating decisions of the United States Courts of Appeals: *Federal Digest, Modern Federal Practice Digest, West's Federal Practice Digest 2d, West's Federal Practice Digest 3d,* pocket-part supplements to *West's Federal Practice Digest 3d* for December 1987, February 1988, and April 1988, and the Key Number Digests appearing in volumes 835-40 of the Federal Reporter, Second Series, and advance sheet numbers 18-28. In earlier West digests, rule of deference cases were collected under the key number Courts 360.2, and to a lesser extent under the key numbers Courts 359 and 370. In later digests, which include a separate index for the subject "Federal Courts," most rule of deference cases are annotated under the key numbers Federal Courts 781-86. References to the rule of deference also surfaced in annotations collected under the Federal Courts key numbers 372, 383, 390, 391, 755, 776, 800, 850, and 870, as well as under United States Magistrates key number 5. This study reviews the annotations collected under all these key numbers.

Researching the rule of deference cases revealed that the digesters had not, in many cases, separately annotated this point of law. Accordingly, the search of the West Digest System was supplemented with a number of additional case-identifying approaches: use of *Shepard's Federal Citations* to find later authorities citing key cases; a review of all cases cited in those portions of the Wright, Miller, and Cooper treatise and *Moore's Federal Practice* dealing with the rule of deference;[322] and the use of various Westlaw searches directed at the databases for all federal courts of appeals. Some rule of deference cases undoubtedly slipped through this research net. Nonetheless, this research effort, which was finished in February 1989, reflects by far the most complete study ever directed at this subject.

In addition, this Appendix offers two services not available in other legal materials. First, it provides a focused look at the status and idiosyncrasies of the rule of deference in each of the federal circuits. This breakdown of the cases should provide a useful aid for lawyers practicing before particular courts and also should give a flavor of how the rule has assumed different colorations in different courts. Second, this Appendix highlights those state law cases in which a court has concluded

322. 19 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 14, § 4507, at 107-12 nn.59-66; 1A MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 0.309[2], at 3125 n.28.

either that the rule of deference carries added force or that the rule is subject to an exception and therefore inapplicable. To date, commentators, and even indexers, have ignored these critical aspects of the rule. The author hopes the structured identification of these authorities, together with the more extensive treatment of exceptions to the rule in Appendix II, will give particular help to judges and lawyers who must deal with the rule of deference.

FIRST CIRCUIT

The First Circuit has stated that "we often defer to district court interpretations of state law."[323] Nonetheless, the First Circuit appears to have used the rule of deference less frequently than most circuits. This study uncovered only eleven reported decisions in which the court cited some version of the rule. Seven of those cases, moreover, involved application of Puerto Rican law, whose unusual Spanish-law origins strengthens the argument for deference.[324]

In *Garcia v. Friesecke*,[325] involving Puerto Rican law, the court stated broadly that "[m]uch deference is accorded to a district court's construction of the law of the locality in which it sits."[326] The court also has cited the rule of deference in state law, as opposed to territorial law, cases,[327] observing that "we

323. Burns v. Sullivan, 619 F.2d 99, 106 (1st Cir.), *cert. denied*, 449 U.S. 892 (1980).

324. *See* Diaz-Buxo v. Trias Monge, 593 F.2d 153, 156-57 (1st Cir.) (deferring on question of Puerto Rican law concerning meaning of Spanish phrase, because it is "an unfamiliar legal system"), *cert. denied*, 444 U.S. 833 (1979); *see also* Rodriguez v. Escambron Dev. Corp., 740 F.2d 92, 96 (1st Cir. 1984) (stating that "[b]ecause of our usual deference to the local district judges of Puerto Rico on matters of Puerto Rican law, we are naturally inclined to affirm"); Gual Morales v. Hernandez Vega, 604 F.2d 730, 732 (1st Cir. 1979) (stating that "we give considerable deference to the district judges who are citizens of Puerto Rico and well versed in the Spanish underpinnings of Puerto Rico law"); *infra* notes 662-68 and accompanying text (discussing rule as applied to territorial law in Ninth Circuit); *cf.* Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315, 319 (1st Cir. 1978) (noting that Puerto Rican law "commingles elements of common and civil law").

325. 597 F.2d 284 (1st Cir.), *cert. denied*, 444 U.S. 940 (1979).

326. *Id.* at 295; *see also* Marrero Morales v. Bull S.S. Co., 279 F.2d 299, 302 (1st Cir. 1960) (stating that "[t]he conclusion as to local law of a judge who is from the local bar is entitled to great weight").

327. *See* New Hampshire Auto. Dealers Ass'n Inc. v. General Motors Corp., 801 F.2d 528, 532 (1st Cir. 1986) (citing rule in case concerning New Hampshire statute); Dennis v. Rhode Island Hosp. Trust Nat'l Bank, 744 F.2d 893, 896 (1st Cir. 1984) (applying rule to "technical subject matter primarily of state concern" involving Rhode Island law); Rose v. Nashua Bd. of Educ., 679 F.2d 279,

are reluctant to interfere with a reasonable construction of state law made by a district judge, sitting in the state, who is familiar with that state's law and practices."[328] In support of the rule, the court has cited Supreme Court authority[329] and cases from other circuits,[330] and has noted the competence of local judges.[331] The court has applied the rule to questions of trust,[332] limitations,[333] workers' compensation,[334] and res judicata[335] law, as well as to a question of statutory interpretation under a New Hampshire statute concerning price discrimination in motor vehicle sales.[336] The court was "inclined to give deference" to the district court's ruling in the "area of intermingled state and federal law" involved in selecting a state statute of limitations for a federal claim.[337]

The court nonetheless has recognized limits on the rule of deference. In *Garcia*, for example, while citing the rule, the court reversed a summary judgment for one plaintiff on state law grounds.[338] In *Rodriguez v. Escambron Development Corp.*,[339] the court cited the rule but did not apply it because

281 (1st Cir. 1982) (affirming district court ruling on New Hampshire law); Burns v. Sullivan, 619 F.2d 99, 106 (1st Cir.) (citing rule, but declining to defer on particular facts presented), *cert. denied*, 449 U.S. 893 (1980).

328. *Rose*, 679 F.2d at 281; *accord Dennis*, 744 F.2d at 896.

329. *See* Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315, 319 (1st Cir. 1978) (citing Runyon v. McCrary, 427 U.S. 160, 181-82 (1976)); Graffals Gonzalez v. Garcia Santiago, 550 F.2d 687, 688 (1st Cir. 1977) (per curiam) (also citing *Runyon*); *Marrero Morales*, 279 F.2d at 302 (citing Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956)); *see also New Hampshire Auto. Dealers*, 801 F.2d at 532 (citing Bishop v. Wood, 426 U.S. 341 (1976)); *Dennis*, 744 F.2d at 896 (same); *Rose*, 679 F.2d at 281 (same); Berrios Rivera v. British Ropes, Ltd., 575 F.2d 966, 970 (1st Cir. 1978) (citing *Bernhardt*).

330. *See Rose*, 679 F.2d at 281 (citing Sixth and Tenth Circuits); *Berrios Rivera*, 575 F.2d at 970 (citing Second, Fourth and Eighth Circuits).

331. *See, e.g., Rose*, 679 F.2d at 281; *Berrios Rivera*, 575 F.2d at 970.

332. *See* Dennis v. Rhode Island Hosp. Trust Nat'l Bank, 744 F.2d 893, 896 (1st Cir. 1984).

333. *See* Gual Morales v. Hernandez Vega, 604 F.2d 730, 732 (1st Cir. 1979); *Ramirez de Arellano*, 575 F.2d at 319; Marrero Morales v. Bull S.S. Co., 279 F.2d 299, 302 (1st Cir. 1960).

334. *See* Garcia v. Friesecke, 597 F.2d 284, 295 (1st Cir.), *cert. denied*, 444 U.S. 940 (1979).

335. *See* Rodriguez v. Baldrich, 628 F.2d 691, 694 (1st Cir. 1980); Berrios Rivera v. British Ropes, Ltd., 575 F.2d 966, 969 (1st Cir. 1978).

336. *See* New Hampshire Auto. Dealers Ass'n Inc. v. General Motors Corp., 801 F.2d 528, 532 (1st Cir. 1986).

337. Graffals Gonzalez v. Garcia Santiago, 550 F.2d 687, 688 (1st Cir. 1977) (per curiam).

338. *Garcia*, 597 F.2d at 295.

339. 740 F.2d 92 (1st Cir. 1984).

the case actually presented a question of federal law.[340]

In three other cases, the court suggested potentially important exceptions to the rule. First, in *Burns v. Sullivan*,[341] the court found deference inappropriate on the facts because the district court's central reasoning rested on a misreading of earlier First Circuit cases.[342] Second, in *Ramirez de Arellano v. Alverez de Choudens*,[343] the court refused to defer to the district court's ruling because a legal issue raised "a sharp conflict among the judges of that district."[344] The panel concluded that the conflict required "an independent assessment of the question by a court of appeals."[345]

Finally, in *Rodriguez v. Baldrich*,[346] a case involving res judicata, the First Circuit declined to defer because the district court did not provide "an explicit and reasoned ruling" that discussed the relevant authorities.[347] Indeed, the panel refused deference even though several cases supported the lower court's disposition and those cases "were cited to the district court."[348] Furthermore, the appeals court did not review the legal issue de novo despite the inapplicability of the rule of deference.[349] Instead, as the court explained:

> In these circumstances, we think the best course is to remand to the district court for further consideration. In this way, the district court can review the status of Puerto Rican law concerning *res judicata* and its application to this case, and can explain in some detail the conclusion it reaches about whether the doctrine of *res judicata* bars the plaintiffs' federal suit. If the district court thinks the issue is unclear, it can consider certifying the question to the Puerto Rican Supreme Court . . . .[350]

SECOND CIRCUIT

In *Factors Etc., Inc. v. Pro Arts, Inc.*,[351] a Second Circuit panel wrote: "It has frequently been observed that a court of appeals should give considerable weight to state law rulings

340. *Id.* at 96.
341. 619 F.2d 99 (1st Cir.), *cert. denied*, 449 U.S. 893 (1980).
342. *Id.* at 106.
343. 575 F.2d 315 (1st Cir. 1978).
344. *Id.* at 319.
345. *Id.*
346. 628 F.2d 691 (1st Cir. 1980).
347. *Id.* at 694.
348. *Id.*
349. *Id.*
350. *Id.*
351. 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

made by district judges, within the circuit, who possess familiarity with the law of the state in which their district is located."[352] This principle, however, has not "frequently been observed" in the Second Circuit itself. This study uncovered only five Second Circuit cases specifically endorsing some version of the rule of deference.[353]

The leading Second Circuit case appears to be *Lomartira v. American Automobile Insurance Co.*[354] The issue in *Lomartira* was whether "fraud or false swearing which will void a policy under the standard Connecticut fire insurance policy . . . does not encompass fraud or false swearing in the insured's testimony at trial."[355] Connecticut law contained no authority on the question, and courts in other jurisdictions were divided. Applying the rule of deference, the court of appeals upheld the district court's adoption of the minority view while noting that "the question . . . is a close one, upon which we need not and do not express a view."[356] The court found determinative the rule that:

> In a case like this one, where a question of state law must be determined in a diversity case, great weight should be given the determination of a district judge sitting in that state. A court of appeals should not reverse the considered judgment of the district court on the law of its state *unless it believes it to be clearly wrong.*[357]

In support of this proposition, the court cited the Supreme Court's decision in *Bernhardt v. Polygraphic Co. of America,*[358] and added in a footnote: "Not infrequently, no member of the panel of a court of appeals is a member of the bar of the state whose law is in question. That is the case here."[359]

Post-*Lomartira* cases have not applied a "clearly wrong" test. Indeed, no other Second Circuit decision cites the *Lomartira* "clearly wrong" standard, although the circuit has cited *Lomartira* generally, stating "we accept the reasonable and carefully considered analysis by the bankruptcy judge, adopted by the district court, on this unanswered question of New York law."[360] In other cases, Second Circuit panels have afforded

352. *Id.* at 281.
353. *See infra* notes 354, 361-60 and accompanying text.
354. 371 F.2d 550 (2d Cir. 1967).
355. *Id.* at 553.
356. *Id.* at 554.
357. *Id.* (emphasis added).
358. 350 U.S. 198 (1956).
359. 371 F.2d at 554 n.6.
360. *In re* Leasing Consultants, Inc., 592 F.2d 103, 109 (2d Cir. 1979).

"special deference,"[361] and "some deference"[362] to state law rulings of district courts.

Some Second Circuit cases suggest a hesitancy to review state law rulings deferentially. In *Joy v. North*[363] for example, the majority overturned a district court decision that under the business judgment rule an independent committee of the board of directors could refuse to pursue a derivative action. The dissent in *Joy* complained that "a district judge's interpretation of the law of the state in which he sits should be accorded substantial deference."[364] Similarly, in *Ziman v. Employers Fire Insurance Co.*,[365] the dissent faulted the majority for not deferring because *Ziman* was "an appropriate case in which to exercise the commendable restraint" defined earlier in *Lomartira*.[366]

Finally, the Second Circuit has recognized a significant exception to the rule of deference. Prior to 1960, at least one Second Circuit case suggested an endorsement of deference to district courts.[367] In the 1961 case, *Ryan v. St. Johnsbury & Lamoille County Railroad*,[368] however, the court refused to defer to the district court's state law ruling. Judge Friendly reasoned that:

> Although, of course, liability is governed by Vermont law, we find nothing to indicate that the District Judge considered he was applying any special Vermont rule different from that prevailing elsewhere; hence the question of the degree of deference due by us to such a ruling . . . does not arise.[369]

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361. *See* O'Rourke v. Eastern Air Lines, 730 F.2d 842, 847 (2d Cir. 1984); *see also* Saloomey v. Jeppesen & Co., 707 F.2d 671, 676 (2d Cir. 1983) (citing *Bernhardt*). In *O'Rourke*, the court added that: "This [special deference] is especially persuasive when this court is called upon to wade into New York's choice-of-law quagmire." 730 F.2d at 847.

362. *See* Deutsch v. Health Ins. Plan, 751 F.2d 59, 68 (2d Cir. 1984).

363. 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

364. *Id.* at 900 (Cardamone, J., dissenting).

365. 493 F.2d 196 (2d Cir. 1974).

366. *Id.* at 204 (Timbers, J., dissenting). Judge Timbers noted that the district court judge had served for 35 years at the Vermont bar, as a state trial judge, and as an associate justice and chief justice of the Vermont Supreme Court. *Id.* at 204 n.5.

367. *See* McGettrick v. Fidelity & Casualty Co., 264 F.2d 883, 887 (2d Cir. 1959) (citing, in connection with acceptance of district court ruling, rule of deference cases from other circuits).

368. 290 F.2d 350 (2d Cir. 1961).

369. *Id.* at 352; *see also* Competex, S.A. v. Labow, 783 F.2d 333, 340 n.16 (2d Cir. 1986) (reversing because district court acted "uncritically" and panel believed "the state's highest court would disagree" with district court).

THIRD CIRCUIT

The status of the rule of deference in the Third Circuit is uncertain. Few cases have considered whether such a rule applies and what effect it might have.

Several Third Circuit cases suggest that de novo review is appropriate in state law cases. Thus, in *William B. Tanner Co. v. WIOO, Inc.*,[370] the court flatly stated that "in determining whether the facts as found by the district court constitute apparent authority under Pennsylvania law, we may exercise an 'independent review.' "[371] Similarly, in *Fassett v. Delta Kappa Epsilon*,[372] the court stated: "We have plenary review over the district court's conclusions regarding the applicable Pennsylvania law."[373] Again, in *Connecticut Mutual Life Insurance Co. v. Wyman*,[374] the court exercised "plenary review" in evaluating a district court jury instruction on Connecticut law regarding the effect of false statements in insurance applications.[375] Recent decisions support the conclusion that the Third Circuit engages in "plenary review."[376] Indeed, in *Craig v. Lake Asbestos of Quebec Ltd.*,[377] the court cited the Ninth Circuit's *McLinn* decision with seeming approval, stating that "review is plenary."[378] In each of these cases, however, the court did not consider expressly the possibility of deferential review and did not engage in significant analysis.

In *Compagnie des Bauxites de Guinee v. Insurance Co. of North America*,[379] Chief Judge Seitz explored at greater length the proper standard of review in diversity cases. In keeping with circuit court precedent, he endorsed "a plenary standard of review."[380] Chief Judge Seitz suggested, however, that some deference still may be appropriate under this standard:

370. 528 F.2d 262 (3d Cir. 1975).
371. *Id.* at 266.
372. 807 F.2d 1150 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987).
373. *Id.* at 1157.
374. 718 F.2d 63 (3d Cir. 1983).
375. *Id.* at 65.
376. *See* Hatcher v. Jackson, 853 F.2d 212, 214 (3d Cir. 1988) (stating that review is plenary when district court decides whether state law violation occurred on undisputed record), *cert. denied*, 109 S. Ct. 815 (1989); Zamboni v. Stamler, 847 F.2d 73, 76 (3d Cir. 1988) (stating that "our review is plenary" on state and federal claims), *cert. denied*, 109 S. Ct. 245 (1989); United Coal Cos. v. Powell Constr. Co., 839 F.2d 958, 965 (3d Cir. 1988) (applying "plenary review").
377. 843 F.2d 145 (3d Cir. 1988).
378. *Id.* at 148.
379. 724 F.2d 369 (3d Cir. 1983).
380. *Id.* at 371.

"Although our review is plenary, this does not mean that in discharging our function we will not take into consideration the district judge's prediction of the law of the state in which he sits."[381]

Edwards v. Born, Inc.[382] provides further evidence that the Third Circuit accepts some form of the rule of deference. In *Edwards*, a Third Circuit panel upheld a Virgin Islands district court's conclusion that "apparent authority could suffice to render [a] settlement agreement effective."[383] In reaching its conclusion, the court specifically cited "the rule that a district court's determination of local law is entitled to a measure of deference on appeal when there is no clear local authority."[384] In support of this broadly stated proposition, however, the court cited only cases in which the Ninth and First Circuits extended deference to the district courts of Guam and Puerto Rico.[385]

The Third Circuit endorsed deferential review for both territorial and state law cases in *Saludes v. Ramos*.[386] In *Saludes* the court overturned the district court's construction of the Virgin Islands Tort Claims Act after first considering "what standard of review to apply."[387] The court rejected the appellee's argument that "on a matter of territorial law [the court] should only reverse if there is 'manifest error.' "[388] The court nonetheless went on to observe:

> The district court's reading of local law should be respected, but we will not accord it any greater deference than we would in a diversity action. In the latter type of action, federal appellate courts have traditionally recognized that the district judge's prediction of state law is weighty because of his or her familiarity with the particular jurisdiction.[389]

The court concluded, however, that this practice "has not required a different standard of review" and the court therefore exercised plenary review in considering the district court's holding.[390]

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381. *Id.*
382. 792 F.2d 387 (3d Cir. 1986).
383. *Id.* at 390.
384. *Id.*
385. *Id.*
386. 744 F.2d 992 (3d Cir. 1984). *But see* People v. Yang, 850 F.2d 507, 510 (9th Cir. 1988) (citing *Saludes* as requiring "de novo review").
387. 744 F.2d at 993.
388. *Id.*
389. *Id.* at 994 (citing Supreme Court's *Bernhardt* decision).
390. *Id.*

Read together, the Third Circuit cases recognize the propriety of some modest measure of special deference in cases considering issues of state or territorial law that is not applicable in federal law cases. It thus seems wrong to say that the Third Circuit "has never expressly adopted" the "general rule" of "deferential review."[391] The court's emphasis that such deference does not alter the standard of "plenary review" and the conspicuous dearth of cases involving affirmances motivated by such deference suggest, however, that the rule of deference is not strong in the Third Circuit.

FOURTH CIRCUIT

The Fourth Circuit has recognized that "[i]n determining state law in diversity cases where there is no clear precedent, courts of appeals are disposed to accord substantial deference to the opinion of a federal district judge because of his familiarity with the state law which must be applied."[392] This study disclosed ten Fourth Circuit cases expressly endorsing this rule.

The earliest Fourth Circuit case applying the rule is *Williams v. Weyerhaeuser Co.*[393] The panel relied heavily on the rule in that case, which involved antiquated North Carolina real estate recording laws. The court stated that "we are entitled to accept the interpretation of the District Judge as one versed in such local matters . . . . This is especially true when, as here, his conclusions are articulated with clarity and no contrary precedent of the Supreme Court of North Carolina is at hand."[394]

Later cases indicate that Fourth Circuit panels will "defer,"[395] or afford "some weight,"[396] "substantial deference,"[397]

391. Note, *supra* note 11, at 158.

392. Caspary v. Louisiana Land & Exploration Co., 707 F.2d 785, 788 n.5 (4th Cir. 1983).

393. 378 F.2d 7 (4th Cir. 1967) (per curiam).

394. *Id.* at 8.

395. *See* Nationwide Mut. Ins. Co. v. Brown, 779 F.2d 984, 990 (4th Cir. 1985) (noting that two South Carolina district judges apparently agreed on state law question); United States v. Burnsed, 566 F.2d 882, 884 (4th Cir. 1977) (noting that district court judge also had served as state court judge), *cert. denied*, 434 U.S. 1077 (1978).

396. *See* Thurston v. Macke Co., 716 F.2d 255, 255 (4th Cir. 1983) (deferring in Virginia case despite presence of Virginia judge on panel).

397. *See* Sokolowski v. Flanzer, 769 F.2d 975, 981 (4th Cir. 1985) (noting that "district court thoughtfully analyzed the applicable principles"); Jaffe-Spindler Co. v. Genesco, Inc., 747 F.2d 253, 257 n.5 (4th Cir. 1984); *see also* Corrigan v. United States, 815 F.2d 954, 964 (4th Cir.) (Murnahan, J., dissenting) (complaining that court should remand for further consideration in light of in-

or "significant weight"[398] to state law rulings. The court has applied the rule very recently.[399] In *Sauerhoff v. Hearst Corp.*,[400] the court justified the rule of deference by quoting with approval Professor Wright:

> As a general proposition, a federal court judge who sits in a particular state and has practiced before its courts may be better able to resolve complex questions as to the law of that state than is some other federal judge who has no such personal acquaintance with the law of the state. For this reason federal appellate courts have frequently voiced reluctance to substitute their own view of the state law for that of the federal judge.[401]

The court went on to observe that: "We see the instant District Judge possessed of these qualifications."[402] The Fourth Circuit has cited the rule of deference in cases involving property,[403] corporations,[404] landlord-tenant,[405] insurance,[406] conflicts,[407] libel,[408] workers compensation,[409] and criminal law.[410]

Two Fourth Circuit cases, however, create significant exceptions to the rule of deference. In *Rabon v. Guardsmark, Inc.*,[411] the court stated that "[w]hile we normally accord significant weight to a district judge's interpretation of the law of the state in which he sits,"[412] the court would not defer in the case before it. The court reasoned:

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tervening state decision, rather than deciding issue itself; stating that "substantial deference" rule is "well established"), *cert. denied*, 108 S. Ct. 290 (1987).

398. *See* Rabon v. Guardsmark, Inc., 571 F.2d 1277, 1279 n.1 (4th Cir.), *cert. denied*, 439 U.S. 866 (1978).

399. *See* National Bank v. Pearson, 863 F.2d 322, 326 (4th Cir. 1988) (applying "substantial deference" and noting that lower court judge "as an attorney and district court judge has had considerable experience in dealing with Maryland law").

400. 538 F.2d 588 (4th Cir. 1976).

401. *Id.* at 591.

402. *Id.*; see also *id.* at 592 (Haynsworth, J., dissenting) (joining "the majority opinion in its statement of deference to the district judge in the interpretation of Maryland law in this rather quixotic area," but chiding majority for deferring in "selective" fashion).

403. Williams v. Weyerhaeuser Co., 378 F.2d 7, 7 (4th Cir. 1967).

404. Caspary v. Louisiana Land & Exploration Co., 707 F.2d 785, 789 (4th Cir. 1983).

405. Jaffe-Spindler Co. v. Genesco, Inc., 747 F.2d 253, 257 (4th Cir. 1984).

406. Nationwide Mut. Life Ins. Co. v. Brown, 779 F.2d 984, 988 (4th Cir. 1985).

407. Sokolowski v. Flanzer, 769 F.2d 975, 978 (4th Cir. 1985).

408. Sauerhoff v. Hearst Corp., 538 F.2d 588, 590 (4th Cir. 1976).

409. Thurston v. Macke Co., 716 F.2d 255, 255 (4th Cir. 1983).

410. United States v. Burnsed, 566 F.2d 882, 884 (4th Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978).

411. 571 F.2d 1277 (4th Cir.), *cert. denied*, 439 U.S. 866 (1978).

412. *Id.* at 1279 n.1.

> The district court decided the issue of liability in an oral opinion. It gives us little aid in deciding this appeal. It contains no citation of authority except a passing reference to a case that can only be identified by reference to the argument of counsel .... An issue of the novelty, closeness and importance to the parties which this appeal presents was deserving of fuller treatment.[413]

The court recognized another exception to the rule of deference in *Caspary v. Louisiana Land & Exploration Co.*,[414] a case concerning the right under Maryland law of a corporate shareholder who holds less than five percent of issued stock to examine corporate books. After noting the general rule of deference, the court went on to observe:

> Here, however, we have a panel on appeal which includes two judges who also have Maryland antecedents. Their views differ as to the proper outcome of the cases. In such circumstances deference to the opinion of the one who disagrees with the district judge should serve to neutralize any support deriving from merely the existence, as distinct from the contents, of [the district judge's] opinion.[415]

These authorities suggest that the rule of deference has limited vitality in the Fourth Circuit. Few cases have cited the rule, fewer cases still have relied on it, and the court recognizes broad exceptions to the rule. In these circumstances, the rule seems ripe for reconsideration.

FIFTH CIRCUIT

The Fifth Circuit often has recognized and applied the rule of deference. The court originally based its acceptance of the rule on the Supreme Court's practice of deferring to district court rulings,[416] while noting, incorrectly at the time, that circuit court deference reflected "the practice generally followed in such a situation."[417] The court also has explained:

> This policy is grounded in the rationale that a federal trial judge who sits in a particular state and has practiced before its courts is "better able to resolve certain questions about the law of that state than is some other federal judge who has no such personal acquaintance with

413. *Id.*

414. 707 F.2d 785 (4th Cir. 1983).

415. *Id.* at 788 n.5.

416. *See, e.g.*, Houston Oil Field Material Co. v. Stuard, 406 F.2d 1052, 1054 n.1 (5th Cir. 1969); Delduca v. United States Fidelity & Guar. Co., 357 F.2d 204, 205 n.1 (5th Cir. 1966); Ferran v. Illinois Cent. R.R., 293 F.2d 487, 489 (5th Cir. 1961), *cert. denied*, 368 U.S. 994 (1962); Sudderth v. National Lead Co., 272 F.2d 259, 263 n.11 (5th Cir. 1959); *see also* Green v. Amerada-Hess Corp., 612 F.2d 212, 214 (5th Cir.) (affording special weight to district court judge's ruling), *cert. denied*, 449 U.S. 952 (1980); Black v. Fidelity & Guar. Ins. Underwriters, 582 F.2d 984, 987 (5th Cir. 1978).

417. *Sudderth*, 272 F.2d at 263.

the law of the state."[418]

At least forty-five Fifth Circuit cases have cited the rule. The court has acknowledged that the traditional standard of de novo review is "tempered somewhat" in state law cases by the rule's application.[419]

In one oft-cited case the court asserted that "[a] federal district court judge's determination on the law of his state is, as a rule, entitled to great weight on review."[420] Most other Fifth Circuit cases also identify "great weight" as the proper degree of deference.[421] In other cases, the court has used similar expressions—namely, "substantial deference,"[422] "great deference,"[423] "special deference,"[424] "considerable weight,"[425]

418. Cole v. Elliott Equip. Corp., 653 F.2d 1031, 1034 (5th Cir. Unit A Aug. 1981); *see also* Halpern v. Lexington Ins. Co., 715 F.2d 191, 192 (5th Cir. 1983) (per curiam) (stating that appellate court will give great weight to district judge experienced in law of state); O'Toole v. New York Life Ins. Co., 671 F.2d 913, 914 (5th Cir. 1982) (finding appropriate deference to judge "schooled and skilled in the law of her state"); Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300, 304 (5th Cir. 1982) (per curiam) (noting that district judge sitting in state who has practiced before state's courts is better able to resolve local law issue).

419. *Halpern*, 715 F.2d at 192.

420. Avery v. Maremont Corp., 628 F.2d 441, 446 (5th Cir. 1980).

421. *See, e.g.*, Merchants Nat'l Bank v. Southeastern Fire Ins. Co., 854 F.2d 100, 105 (5th Cir. 1988); Foreman v. Exxon Corp., 770 F.2d 490, 496 n.9 (5th Cir. 1985); Tran v. Manitowoc Eng'g Co., 767 F.2d 223, 229 (5th Cir. 1985); Galindo v. Precision Am. Corp., 754 F.2d 1212, 1217 (5th Cir. 1985); Armstrong v. Farm Equip. Co., 742 F.2d 883, 886 (5th Cir. 1984); Acree v. Shell Oil Co., 721 F.2d 524, 525 (5th Cir. 1983) (per curiam); Smith v. Mobil Corp., 719 F.2d 1313, 1317 (5th Cir. 1983); *Halpern*, 715 F.2d at 192; *Commonwealth Life Ins.*, 669 F.2d at 304; Robertshaw Controls Co. v. Pre-Engineered Prods., Co., 669 F.2d 298, 300 (5th Cir. 1982); Watson v. Callon Petroleum Co., 632 F.2d 646, 648 (5th Cir. 1980) (per curiam); Southern Ry. v. State Farm Mut. Auto. Ins. Co., 477 F.2d 49, 52 n.3 (5th Cir. 1973); C.H. Leavell & Co. v. Board of Comm'rs, 424 F.2d 764, 766 (5th Cir. 1970); Insurance Co. of N. Am. v. English, 395 F.2d 854, 860 (5th Cir. 1968); Diamond Crystal Salt Co. v. Thielman, 395 F.2d 62, 65 (5th Cir. 1968); City Nat'l Bank v. United States, 383 F.2d 341, 342 (5th Cir. 1967) (per curiam); Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967); Delduca v. United States Fidelity & Guar. Co., 357 F.2d 204, 205 n.1 (5th Cir. 1966); Sudderth v. National Lead Co., 272 F.2d 259, 263 (5th Cir. 1959).

422. *See* Stephenson v. Paine Webber Jackson & Curtis, Inc., 839 F.2d 1095, 1101 n.19 (5th Cir.) (citing Edwards v. State Farm Ins. Co., 833 F.2d 535, 541 (5th Cir. 1987)), *cert. denied*, 109 S. Ct. 310 (1988).

423. *See, e.g.*, NCH Corp. v. Broyles, 749 F.2d 247, 253 n.10 (5th Cir. 1985); Trahan v. First Nat'l Bank, 690 F.2d 466, 468 (5th Cir. 1982); O'Toole v. New York Life Ins. Co., 671 F.2d 913, 914 (5th Cir. 1982); Black v. Fidelity & Guar. Ins. Underwriters, 582 F.2d 984, 987 (5th Cir. 1978); Devers v. Mobil Chem. Corp., 488 F.2d 258, 260 (5th Cir. 1973), *cert. denied*, 417 U.S. 947 (1974).

424. *See, e.g.*, Dean v. Dean, 821 F.2d 279, 283 n.4 (5th Cir. 1987); Golden v. Cox Furniture Mfg. Co., 683 F.2d 115, 117 (5th Cir. 1982) (per curiam).

425. *See, e.g.*, Ferran v. Illinois Cent. R.R., 293 F.2d 487, 489 (5th Cir. 1961), *cert. denied*, 368 U.S. 994 (1962).

"special weight,"[426] and "proper consideration."[427] One panel stated that it normally "would place considerable stock in the views of a district judge."[428] Other panels have said that they "usually defer,"[429] or "are reluctant to substitute their view of state law for that of the district court,"[430] or that the court affords "some deference."[431] In one case, the circuit court affirmed because the appellant "cited no Louisiana authority that would impugn the district judge's judgment and we see no logical flaw in his reasoning."[432] Another panel cited the district court's familiarity with local law as "a factor which weighs" in the balance.[433]

It appears that the Fifth Circuit has not committed itself to upholding state law rulings unless "clearly erroneous." A very recent Fifth Circuit decision, however, after noting the "great deference" standard, added that reversal was improper unless the district court's ruling was "obviously wrong."[434]

In one case, the court noted that its "usual deference" is "enhanced" when "two different district judges are in full agreement as to the applicable law."[435] The Fifth Circuit also

426. *See, e.g.*, Green v. Amerada-Hess Corp., 612 F.2d 212, 214 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980); Houston Oil Field Material Co. v. Stuard, 406 F.2d 1052, 1054 n.1 (5th Cir. 1969).

427. *See, e.g.*, Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1180 n.5 (5th Cir. 1971).

428. Lucas v. Firestone Tire & Rubber Co., 458 F.2d 495, 496 (5th Cir. 1972).

429. Jureczki v. City of Seabrook, 760 F.2d 666, 669 (5th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986).

430. Petersen v. Klos, 433 F.2d 911, 912 (5th Cir. 1970); (per curiam); *accord* Cole v. Elliott Equip. Corp., 653 F.2d 1031, 1034 (5th Cir. Unit A Aug. 1981); Petersen v. Klos, 426 F.2d 199, 203 (5th Cir. 1970;) *see* Stool v. J. C. Penney Co., 404 F.2d 562, 563 (5th Cir. 1968) (stating that court is "hesitant to attempt to second-guess").

431. Schuster v. Martin, 861 F.2d 1369 (5th Cir. 1988) (affording "some deference"); *In re* Air Crash at Dallas/Fort Worth Airport, 861 F.2d 814, 816 (5th Cir. 1988) (same).

432. Robertshaw Controls Co. v. Pre-Engineered Prods., Co., 669 F.2d 298, 300 (5th Cir. 1982).

433. Tardan v. Chevron Oil Co., 463 F.2d 651, 652 (5th Cir. 1972).

434. Balliache v. Fru-Con Constr. Co., 866 F.2d 798, 799 (5th Cir. 1989) (per curiam). The court added, somewhat curiously, that it generally would not apply such a large dose of deference in "a case involving a rule 12(b)(6) dismissal based upon . . . . the inadequacy of the complaint." *Id.* at 799 n.2; *see also* Acree v. Shell Oil Co., 721 F.2d 524, 525 (5th Cir. 1984) (per curiam) (citing Ninth Circuit authority in applying "clearly wrong" standard); Trahan v. First Nat'l Bank, 690 F.2d 466, 468 (5th Cir. 1982) (noting that state law rulings "will be overturned if clearly wrong"); Avery v. Maremont Corp., 628 F.2d 441, 446 (5th Cir. 1980) (same).

435. Watson v. Callon Petroleum Co., 632 F.2d 646, 648 (5th Cir. 1980) (per curiam).

has hinted that reliance on district court expertise is especially applicable in cases involving Louisiana law. The court stated in *Commonwealth Life Insurance Co. v. Neal*[436] that "[t]he soundness of this rationale is aptly demonstrated in this case, where we are dealing with a construction of the law of Louisiana, a civil law jurisdiction where common law principles of contract have only limited relevance."[437] Finally, in at least two cases, the Fifth Circuit has suggested that the rule of deference is "especially" applicable "when 'a statutory scheme is less than clear and capable of varying interpretation.' "[438] The court has not explained why cases of statutory ambiguity warrant greater deference than cases of common-law ambiguity.

The Fifth Circuit has cited the rule of deference in cases of both recurring[439] and limited[440] interest. The circuit has noted the rule in cases involving trover,[441] conversion,[442] limitations,[443] evidence,[444] indemnification,[445] noncompetition agreements,[446] contracts,[447] negligence,[448] partnership,[449]

436. 669 F.2d 300 (5th Cir. 1982).

437. *Id.* at 304.

438. Golden v. Cox Furniture Mfg. Co. 683 F.2d 115, 118 (5th Cir. 1982) (per curiam); *accord Commonwealth Life Ins. Co. v. Neal*, 669 F.2d at 304; Black v. Fidelity & Guar. Ins. Underwriters, 582 F.2d 984, 987 (5th Cir. 1978).

439. *See* Green v. Amerada-Hess Corp., 612 F.2d 212, 214 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980) (concerning availability of wrongful discharge claim for employee terminated for seeking workers' compensation); Petersen v. Klos, 426 F.2d 199, 202-03 (5th Cir. 1970) (concerning seat-belt defense); Diamond Crystal Salt Co. v. Thielman, 395 F.2d 62, 65 (5th Cir. 1968) (concerning effectiveness of pre-tort release); City Nat'l Bank v. United States, 383 F.2d 341, 342 (5th Cir. 1967) (concerning ability of husband and wife to be ordinary business partners); Sudderth v. National Lead Co., 272 F.2d 259, 263 (5th Cir. 1959) (concerning recoverability of punitive damages in trover actions).

440. *See* Delduca v. United States Fidelity & Guar. Co., 357 F.2d 204, 205 (5th Cir. 1966) (concerning "very narrow Florida [statute of limitations] question").

441. *See Sudderth*, 272 F.2d at 263.

442. *See* Trahan v. First Nat'l Bank, 690 F.2d 466, 466 (5th Cir. 1982).

443. *See* Peacock v. Retail Credit Co., 429 F.2d 31, 32 (5th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971); *Delduca*, 357 F.2d at 205.

444. *See* Lucas v. Firestone Tire & Rubber Co., 458 F.2d 495, 496-97 (5th Cir. 1972); Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967).

445. *See* Foreman v. Exxon Corp., 770 F.2d 490, 496 (5th Cir. 1985); Tran v. Manitowoc Eng'g Co., 767 F.2d 223, 229 (5th Cir. 1985).

446. *See* Commonwealth Life Ins. Co. v. Neal, 669 F.2d 300, 304 (5th Cir. 1982).

447. *See* Dean v. Dean, 821 F.2d 279, 283 (5th Cir. 1987); Smith v. Mobil Corp., 719 F.2d 1313, 1317 (5th Cir. 1983).

448. *See* Ferran v. Illinois Cent. R.R., 293 F.2d 487, 489 (5th Cir. 1961), *cert. denied*, 368 U.S. 994 (1962).

449. *See* City Nat'l Bank v. United States, 383 F.2d 341, 342 (5th Cir. 1967).

insurance,[450] leases,[451] releases,[452] corporations,[453] state organizations,[454] interest on damages,[455] products liability,[456] property,[457] workers' compensation,[458] choice of law,[459] mechanics liens,[460] long-arm jurisdiction,[461] agency,[462] and fiduciary obligations.[463]

Recognizing the rule, the circuit nevertheless has stated that "the decision of the local trial judge cannot reasonably be regarded as conclusive."[464] Some cases add that "the parties are entitled to review . . . of the trial court's determination of state law just as they are of any other legal question in a case."[465] Perhaps the leading Fifth Circuit statement of limits on the rule of deference appears in *Stool v. J. C. Penney Co.*:[466]

> [W]e are hesitant to attempt to second-guess the district court which has already ventured intrepidly into the phantom-law wonderland. Since our view of the state law is probably as much a guess as the district court's, the latter cannot be designated categorically as wrong.

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450. *See* Halpern v. Lexington Ins. Co., 715 F.2d 191, 192 (5th Cir. 1983); O'Toole v. New York Life Ins. Co., 671 F.2d 913, 914 (5th Cir. 1982); Black v. Fidelity & Guar. Ins. Underwriters, 582 F.2d 984, 987 (5th Cir. 1978); Insurance Co. of N. Am. v. English, 395 F.2d 854, 860 (5th Cir. 1968).

451. *See* Stool v. J.C. Penney Co., 404 F.2d 562, 563 (5th Cir. 1968).

452. *See* Diamond Crystal Salt Co. v. Thielman, 395 F.2d 62, 65 (5th Cir. 1968).

453. *See* Houston Oil Field Material Co. v. Stuard, 406 F.2d 1052, 1054 (5th Cir. 1969).

454. *See* C. H. Leavell & Co. v. Board of Comm'rs, 424 F.2d 764, 766 (5th Cir. 1970).

455. *See* Watson v. Callon Petroleum Co., 632 F.2d 646, 648 (5th Cir. 1980) (per curiam); Petersen v. Klos, 433 F.2d 911, 912 (5th Cir. 1970) (per curiam).

456. Galindo v. Precision Am. Corp., 754 F.2d 1212, 1217 (5th Cir. 1985); Cole v. Elliott Equip. Corp., 653 F.2d 1031, 1034 (5th Cir. Unit A Aug. 1981); Avery v. Maremont Corp., 628 F.2d 441, 446 (5th Cir. 1980); Devers v. Mobil Chem. Corp., 488 F.2d 258, 260 (5th Cir. 1973), *cert. denied*, 417 U.S. 947 (1974); Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1180 (5th Cir. 1971); Petersen v. Klos, 426 F.2d 199, 203 (5th Cir. 1970).

457. *See* Tardan v. Chevron Oil Co., 463 F.2d 651, 652 (5th Cir. 1972).

458. *See* Green v. Amerada-Hess Corp., 612 F.2d 212, 214 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980).

459. *See* Golden v. Cox Furniture Mfg. Co., 683 F.2d 115, 117-18 (5th Cir. 1982).

460. *See* Robertshaw Controls Co. v. Pre-Engineered Prods., Co., 669 F.2d 298, 300 (5th Cir. 1982).

461. *See* Harville v. Anchor-Wate Co., 663 F.2d 598, 602 (5th Cir. Dec. 1981).

462. *See* Armstrong v. Farm Equip. Co., 742 F.2d 883, 886 (5th Cir. 1984).

463. *See* NCH Corp. v. Broyles, 749 F.2d 247, 253 (5th Cir. 1985).

464. Petersen v. Klos, 426 F.2d 199, 203 (5th Cir. 1970).

465. City Nat'l Bank v. United States, 383 F.2d 341, 342 (5th Cir. 1967); *accord* C. H. Leavell & Co. v. Board of Comm'rs, 424 F.2d 764, 766 (5th Cir. 1970); Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967).

466. 404 F.2d 562 (5th Cir. 1968).

> Ironically enough, however, the district court can be erroneous. We cannot accept the premise that one guess is as good as another, for that would effectively eliminate appellate review in a substantial portion of the cases which come before this court. When a federal court of appeals is of the opinion, as we are in this case, that the district court's view of the applicable state law is against the more cogent reasoning of the best and most widespread authority, it must reverse the judgment of the lower court.[467]

Several cases adopted this analysis, agreeing that reversal is appropriate if the district court's ruling "is against the more cogent reasoning of the best and most widespread authority."[468]

The court has recognized other limitations on the rule as well. For example, reviewing a district court summary judgment issued without a written opinion, the appeals panel noted that they were "not favored with the views of the district court" and therefore had to "make the initial determination."[469] Applying the opposite of this principle, the court in *Peacock v. Retail Credit Co.*[470] explained:

> Unlike *Peterson v. Klos*, the District Judge in this case carefully explained his reasoning. His judgment of where the dimly lit *Erie* path leads is as good as ours would be. We therefore give great weight to the determination of state law by the Trial Judge sitting in the state and familiar with local law and its trends.[471]

One Fifth Circuit panel has stated in a footnote that "when the state law only offers general guidance, the district court's decision is not entitled to any deference."[472] This exception, on its face, seems questionable. After all, when state law provides specific guidance on the state law issue, no rule of deference is needed. It therefore follows that the the rule's purpose is to aid decisionmaking when the road to proper resolution of the issue is "dimly lit,"[473] or "state decisional law affords no

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467. *Id.* at 563.

468. Harville v. Anchor-Wate Co., 663 F.2d 598, 602 (5th Cir. Dec. 1981); *accord* Ward v. Hobart Mfg. Co., 450 F.2d 1176 (5th Cir. 1971) (stating that "[o]therwise appellate review in a substantial number of diversity cases which come before this court would be effectively eliminated").

469. Lucas v. Firestone Tire & Rubber Co., 458 F.2d 495, 496-97 (5th Cir. 1972); *accord* Dean v. Dean, 821 F.2d 279, 283 n.4 (5th Cir. 1987) (stating that deference "is also less where the court fails to set out any analysis"); Petersen v. Klos, 426 F.2d 199, 203 (5th Cir. 1970) (not deferring because "district court did not explain the reasoning behind its finding"). *But cf. Harville*, 663 F.2d at 602 (stating that appeals court should reverse only when district court ruling is "against the more cogent reasoning").

470. 429 F.2d 31 (5th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971).

471. *Id.* at 32 (citation omitted).

472. *Dean v. Dean*, 821 F.2d at 283 n.4.

473. Peacock v. Retail Credit Co., 429 F.2d 31, 32 (5th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971); *see also* Galindo v. Precision Am. Corp., 754 F.2d

guidance."[474]

Finally, the Fifth Circuit has followed the general rule that deference is inappropriate when a district judge from one state applies another state's law.[475] Fifth Circuit decisions evidence the highly malleable quality of the rule of deference. In some cases, the rule appears important and even dispositive.[476] In those cases, the court cites broad statements of the rule, usually emphasizing the great weight or great deference accorded district court opinions. In other cases, the court affords only lip service to the rule, noting its existence but analyzing fully the issues presented.[477] In a number of these cases, moreover, the court rejects the district court's conclusions.[478] In these cases, the court downplays the rule by noting that the district court's opinion is "against the more cogent reasoning of the best and most widespread authority."[479]

In sum, the Fifth Circuit cases indicate that the rule of deference as supplemented by the rule's exceptions is vague and flexible. The cases thus support those observers who view law as highly indeterminate.[480]

1212, 1217 (5th Cir. 1985) (deferring to "educated guess" of district court judge).

474. Black v. Fidelity & Guar. Ins. Underwriters, 582 F.2d 984, 987 (5th Cir. 1978).

475. *See In re* Air Crash at Dallas/Fort Worth Airport, 861 F.2d 814, 816 (5th Cir. 1988).

476. *See* Tran v. Manitowoc Eng'g Co., 767 F.2d 223, 229 (5th Cir. 1985) (citing rule twice); Jureczki v. City of Seabrook, 760 F.2d 666, 669 (5th Cir. 1985) (noting briefly that district court's analysis was "thorough and reasonable"), *cert. denied*, 475 U.S. 1045 (1986); Acree v. Shell Oil Co., 721 F.2d 524, 525 (5th Cir. 1983) (per curiam) (applying rule where opposing views were "supported by almost equally sound reasons"); Robertshaw Controls Co. v. Pre-Engineered Prods., Co., 669 F.2d 298, 300 (5th Cir. 1982) (affirming because district court reasoning was not flawed); Harville v. Anchor-Wate Co., 663 F.2d 598, 602 (5th Cir. Dec. 1981) (affirming because district court's ruling was "reasonable"); Black v. Fidelity & Guar. Ins. Underwriters, 582 F.2d 984, 987 (5th Cir. 1978) (deferring to district court); Tardan v. Chevron Oil Co., 463 F.2d 651, 652 (5th Cir. 1972) (deferring to district court).

477. *See, e.g.*, Armstrong v. Farm Equip. Co., 742 F.2d 883, 886 (5th Cir. 1984); Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967); Ferran v. Illinois Cent. R.R., 293 F.2d 487, 489 (5th Cir. 1961), *cert. denied*, 368 U.S. 994 (1962).

478. *See, e.g.*, Galindo v. Precision Am. Corp., 754 F.2d 1212, 1217 (5th Cir. 1985); Green v. Amerada-Hess Corp., 612 F.2d 212, 214 (5th Cir.), *cert. denied*, 449 U.S. 952 (1980); Ward v. Hobart Mfg. Co., 450 F.2d 1176, 1180 (5th Cir. 1971); Stool v. J. C. Penney Co., 404 F.2d 562, 563 (5th Cir. 1968).

479. *See supra* note 468 and accompanying text.

480. *See supra* notes 219-22 and accompanying text.

SIXTH CIRCUIT

The Sixth Circuit has cited the rule of deference often. This study revealed forty cases, more than two-thirds of them decided during the last decade, that apply the rule. Moreover, the Sixth Circuit ranks with the Tenth Circuit in affording state law rulings the widest measure of deference.

The foundation of the Sixth Circuit's rule of broad deference is *Rudd-Melikian, Inc. v. Merritt*,[481] in which the court explained:

> [T]he rule appears well settled that in diversity cases, where the local law is uncertain under state court rulings, if a federal district judge has reached a permissible conclusion upon a question of local law, the Court of Appeals should not reverse, even though it may think the law should be otherwise. As said in a number of the cases, the Court of Appeals should accept the considered view of the District Judge.[482]

In adopting this approach the court cited Supreme Court precedent[483] as well as earlier Sixth Circuit cases.[484] Notably, the *Rudd-Melikian* court cited as its principal authorities earlier decisions that the Eighth and Ninth Circuits subsequently overruled.[485]

The Sixth Circuit frequently has used the "permissible conclusion" test from *Rudd*, particularly in its most recent decisions.[486] One of the latest Sixth Circuit cases quotes and ap-

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481. 282 F.2d 924 (6th Cir. 1960).

482. *Id.* at 929.

483. *Id.*

484. *Id.* (citing Glassman v. Hertzberg (*In re* Glassman), 262 F.2d 857, 859 (6th Cir. 1958) and Boyd v. Gray, 261 F.2d 914, 915 (6th Cir. 1958) (remanding on issue not previously addressed by district court because it was "advisable to have the views of the District Judge, formerly a practicing lawyer of many years experience in Kentucky, upon this new aspect of the case")).

485. *Rudd-Melikian*, 282 F.2d at 929; *see also infra* notes 605-08, 647 and accompanying text (discussing Eighth and Ninth Circuit cases).

486. *See* Thompson v. Greyhound Lines, Inc., 872 F.2d 1029 (6th Cir. 1989) (table; text in WESTLAW) (No. 88-1327); Foster v. Livingwell Midwest, Inc., 865 F.2d 257 (6th Cir. 1988) (table; text in WESTLAW) (No. 88-5340); Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988); Diggs v. Pepsi-Cola Metro. Bottling Co., 861 F.2d 914, 927 (6th Cir. 1988); Morgan v. Stanley Works, 857 F.2d 1475 (6th Cir. 1988) (table; text in WESTLAW) (No. 87-1865); United McGill Corp. v. Beneficial Commercial Corp., 842 F.2d 333 (6th Cir. 1988) (table; text in WESTLAW) (No. 87-5612); Burdo v. Ford Motor Co., 828 F.2d 380, 383 (6th Cir. 1987); Vaughn v. J.C. Penney Co., 822 F.2d 605, 607 (6th Cir. 1987); Leto v. Southland Corp., 818 F.2d 31 (6th Cir. 1987) (table; text in WESTLAW) (No. 85-3574); Hydro-Dyne, Inc. v. Ecodyne Corp., 812 F.2d 1407 (6th Cir. 1987) (table; text in WESTLAW) (No. 85-3574); Agristor Leasing v. Saylor, 803 F.2d 1401, 1407 (6th Cir. 1986); Wright v. Holbrook, 794 F.2d 1152, 1155 (6th Cir. 1986); Bailey v. V & O Press Co., 770 F.2d 601, 606-07 (6th Cir.

plies the *Rudd* standard.[487] Even more importantly, the court applied the standard in a recent en banc decision.[488] In some cases, the Sixth Circuit has supplemented the *Rudd* standard by further stating that state law rulings warrant "considerable weight."[489] In other cases the court speaks of affording state law rulings "considerable weight" without referring to the "permissible conclusion" test.[490]

In a handful of other cases the court has afforded "substantial deference,"[491] "great weight,"[492] or "the deference due such courts in deciding matters of state law."[493] The court also has

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1985); Wilson v. Beebe, 770 F.2d 578, 590 (6th Cir. 1985) (en banc); Martin v. Joseph Harris Co., 767 F.2d 296, 299 (6th Cir. 1985); Louisville & Jefferson County Metro. Sewer Dist. v. Travelers Ins. Co., 753 F.2d 533, 540 (6th Cir. 1985); Sours v. General Motors Corp., 717 F.2d 1511, 1521 n.8 (6th Cir. 1983); Transamerica Ins. Group v. Beem, 652 F.2d 663, 665 n.3 (6th Cir. 1981); Insurance Co. of N. Am. v. Federated Mut. Ins. Co., 518 F.2d 101, 106 n.3 (6th Cir. 1975); Lee Shops, Inc. v. Schatten-Cypress Co., 350 F.2d 12, 17 (6th Cir. 1965), *cert. denied*, 382 U.S. 980 (1966); *see also* Disner v. Westinghouse Elec. Corp., 726 F.2d 1106, 1115 (6th Cir. 1984) (Conti, J., dissenting) (stating that "we do not reverse merely because we might reach a different conclusion upon *de novo* consideration"); Transamerica Ins. Group v. Beem, 652 F.2d 663, 668 (6th Cir. 1981) (Engle, J., dissenting) (stating that court has "consistently followed the rule").

487. *United McGill*, 842 F.2d at 333.

488. *Wilson v. Beebe*, 770 F.2d at 590 (stating that "it is this court's practice to accept the 'considered view' of a district judge who has reached a 'permissible conclusion' ").

489. *See, e.g., Burdo*, 828 F.2d at 382-83; *Vaughn*, 822 F.2d at 607; *Leto*, 818 F.2d at 31; *Hydro-Dyne*, 812 F.2d at 1407; *Wright*, 794 F.2d at 1155; *Martin*, 767 F.2d at 299, 304.

490. *See, e.g.*, Home Indemnity Co. v. Shaffer, 860 F.2d 186, 188 (6th Cir. 1988); Hines v. Joy Mfg. Co., 850 F.2d 1146, 1150 (6th Cir. 1988); Hartford Accident & Indem. Co. v. J.I. Case Co., 817 F.2d 756 (6th Cir. 1987) (table; text in WESTLAW) (No. 86-3411); St. Paul Fire & Marine Ins. Co. v. Smith, 767 F.2d 921 (6th Cir. 1985) (table; text in WESTLAW) (No. 83-5516); Texaus Inv. Corp. v. Haendiges, 761 F.2d 252, 258 (6th Cir. 1985); Rudd Constr. Equip. Co. v. Clark Equip. Co., 735 F.2d 974, 978 (6th Cir. 1984); Diminnie v. United States, 728 F.2d 301, 306 (6th Cir.), *cert. denied*, 469 U.S. 842 (1984); Bagwell v. Canal Ins. Co., 663 F.2d 710, 712 (6th Cir. 1981); Clairol, Inc. v. Boston Discount Center, Inc., 608 F.2d 1114, 1120 n.8 (6th Cir. 1979); Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081, 1093 (6th Cir. 1978); Martin v. University of Louisville, 541 F.2d 1171, 1176 n.7 (6th Cir. 1976); Roberts v. Berry, 541 F.2d 607, 609 (6th Cir. 1976); Randolph v. New England Mut. Life Ins. Co., 526 F.2d 1383, 1385 (6th Cir. 1975); Filley v. Kickoff Publishing Co., 454 F.2d 1288, 1291 (6th Cir. 1972); Brimhall v. Simmons, 338 F.2d 702, 707 (6th Cir. 1964).

491. *See, e.g.*, Molton v. City of Cleveland, 839 F.2d 240, 250 (6th Cir. 1988).

492. *See, e.g.*, BMW Stores v. Peugeot Motors of Am., 860 F.2d 212, 214-15 (6th Cir. 1988); Williams v. Tillett Bros. Constr. Co., 319 F.2d 300, 303 (6th Cir.), *cert. denied*, 375 U.S. 888 (1963).

493. Lyons v. Tennessee Valley Auth., 840 F.2d 17 (6th Cir. 1988) (table; text in WESTLAW) (No. 87-5309).

said it "ordinarily will defer" to state law rulings[494] and that it will "accept the district court's tenable view."[495]

In *Rudd Construction Equipment Co. v. Clark Equipment Co.*,[496] the court justified the rule in these terms:

> The district judge will normally have a knowledge of that state's law and will have the resources for ascertaining it. In addition, the district judge will generally be sensitive to the principles and attitudes which pervade the law in that state. He is therefore in a better position to predict how the state's courts would resolve an issue, even though they may never have addressed it directly.[497]

Following this rationale, the court has afforded deference in numerous areas of state law, including cases concerning contract,[498] guardianship,[499] corporations,[500] agency,[501] limitations,[502] employer-employee,[503] tort,[504] insurance,[505] products liability,[506] and U.C.C. law.[507]

The Sixth Circuit's own members have criticized the circuit's broad view of the rule of deference. Thus, in *Diggs v. Pepsi-Cola Metropolitan Bottling Co.*,[508] Judge Merritt strongly dissented from the panel majority's affirmance of the district court's ruling using the permissible conclusion standard.[509] Judge Merritt stated:

> While I agree that there are occasions in which our Court may accord

494. First Am. Nat'l Bank-Eastern v. FDIC, 782 F.2d 633, 638 (6th Cir. 1986) (reversing based on "firm conviction" that error occurred).

495. Parham v. Hardaway, 555 F.2d 139, 140 (6th Cir. 1977).

496. 735 F.2d 974 (6th Cir. 1984).

497. *Id.* at 978-79; *see also* Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081, 1093 (6th Cir. 1978) (stating that district court judge "would be possessed of a greater sensitivity to that state's interpretation of its own laws").

498. *See* Lee Shops, Inc. v. Schatten-Cypress Co., 350 F.2d 12, 17 (6th Cir. 1965), *cert. denied*, 382 U.S. 980 (1966); Rudd-Melikian, Inc. v. Merritt, 282 F.2d 924, 929 (6th Cir. 1960).

499. *See* Brimhall v. Simmons, 338 F.2d 702, 707 (6th Cir. 1964).

500. *See* Filley v. Kickoff Publishing Co., 454 F.2d 1288, 1291 (6th Cir. 1972).

501. *See* Randolph v. New England Mut. Life Ins. Co., 526 F.2d 1383, 1385 (6th Cir. 1975).

502. *See* Roberts v. Berry, 541 F.2d 607, 609 (6th Cir. 1976).

503. *See* Parham v. Hardaway, 555 F.2d 139, 140 (6th Cir. 1977); Martin v. University of Louisville, 541 F.2d 1171, 1176 (6th Cir. 1976).

504. *See* Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081, 1093 (6th Cir. 1978).

505. *See* Bagwell v. Canal Ins. Co., 663 F.2d 710, 712 (6th Cir. 1981); Transamerica Ins. Group v. Beem, 652 F.2d 663, 665 (6th Cir. 1981).

506. *See* Hydro-Dyne, Inc. v. Ecodyne Corp., 812 F.2d 1407 (6th Cir. 1987) (table; text in WESTLAW) (No. 85-3574); Agristor Leasing v. Saylor, 803 F.2d 1401, 1407 (6th Cir. 1986).

507. *See* Martin v. Joseph Harris Co., 767 F.2d 296, 299 (6th Cir. 1985).

508. 861 F.2d 914 (6th Cir. 1988).

509. *See id.* at 921-24.

> some deference to the state law expertise of a district judge, I do not concur that this is one of them. We might defer, for example, to the greater familiarity a district judge may have with the evolving direction of that state's highest court in an area of considerable uncertainty. And certainly, to the extent that a district judge writes a detailed opinion explaining a problem of state law, that opinion is entitled to, and receives, deference from our Court. But that would be true of any learned and detailed opinion from a district court, not just those on a topic of state law. Well-founded legal analysis is always entitled to considerable persuasive value.
>
> What we have in this case, however, is an issue on which the state intermediate appellate courts have floundered and the state's highest court, while recently silent on this specific question, has articulated some general principles. I believe that, if we believe the district judge erred, it is an abdication of our responsibility as an appellate court to give the parties less than de novo review of this question.[510]

Like other circuits, the Sixth Circuit has made it clear that its broad deference is not boundless. In *Randolph v. New England Mutual Life Insurance Co.*,[511] for example, the court stated:

> In the absence of "reported [state] decision[s] on the precise issue involved," this court, like other courts in the absence of "controlling state precedent," gives "considerable weight" to the district judge's interpretation of state law. Yet appellants "are entitled to review of the trial court's determination of state law just as they are of any other legal question."[512]

This "entitled to review" language surfaced in later Sixth Circuit cases sporadically and only when the court overturned state law rulings.[513]

The court suggested a more focused limit on the rule of deference in *Transamerica Insurance Group v. Beem*.[514] There the court endorsed the "permissible conclusion" standard of deference in a case presenting two issues of insurance law.[515]

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510. *Id.* at 929 (Merritt., J., concurring in part, dissenting in part).

511. 526 F.2d 1383 (6th Cir. 1975).

512. *Id.* at 1385 (citations omitted). The *Randolph* court cited the Eighth Circuit's decision in *Luke v. American Family Mut. Ins. Co.*, 476 F.2d 1015, 1019-20 (8th Cir. 1972), *aff'd en banc*, 476 F.2d 1023 (8th Cir.), *cert. denied*, 414 U.S. 856 (1973), in support of this assertion. *Luke* specifically endorsed this "entitled to review" reasoning in rejecting the "permissible conclusion" test commonly used in the Sixth Circuit both before and after *Randolph*.

513. *See* First Am. Nat'l Bank-Eastern v. FDIC, 782 F.2d 633, 638 (6th Cir. 1986) (reversing); Roberts v. Berry, 541 F.2d 607, 609 (6th Cir. 1976) (reversing); *see also* Hydro-Dyne, Inc. v. Ecodyne Corp., 812 F.2d 1407 (6th Cir. 1987) (Boggs, J., dissenting) (table; text in WESTLAW) (No. 85-3574) (emphasizing *Randolph* language in response to majority's use of "permissible conclusion" test).

514. 652 F.2d 663 (6th Cir. 1981).

515. *See id.* at 665.

Applying the rule, the Sixth Circuit upheld the district court's ruling on the first issue "[a]lthough the result is harsh and the rule applied seems to us unduly inflexible."[516] In discussing the second issue, however, the court downplayed the significance of the rule of deference:

> With regard to the second issue herein . . . we think the weight of authority is sufficient to overcome this presumption.
>
> It is certainly true, as pointed out in Judge Engel's thoughtful dissent, that a federal appellate court should not reverse a district judge who has reached a permissible conclusion on a question of state law. In this case, however, the record clearly shows that the trial judge did not have the benefit of briefs of counsel in deciding the issue of the sufficiency of the non-waiver agreement. This issue was raised on the spur of the moment, although appellant sufficiently preserved his appeal on it. Therefore, the trial judge did not have the opportunity to consider the authorities cited in this opinion.[517]

This reasoning comports with the en banc court's opinion that courts should accord deference to the "*'considered view'* of a district judge who has reached a permissible conclusion."[518]

In applying the rule of deference, the circuit sometimes has adverted to the district court judge's earlier bench and bar work.[519] The court particularly has noted the judge's service[520] or "lengthy service"[521] as a state trial judge. The court emphasized this point most forcefully in *Texaus Investment Corp. v. Haendiges*:[522]

> In the instant case, Judge Dowd was particularly well qualified to determine whether the Ohio courts would apply the public duty doctrine. Not only is Judge Dowd a district court judge sitting in Ohio, he served on the Ohio Court of Appeals and the Ohio Supreme Court prior to being appointed to the federal bench. While recognizing that we may not rank among the illuminati on Ohio law, we believe that Judge Dowd's opinion, by virtue of his judicial experience on the Ohio

516. *Id.*

517. *Id.* at 665 n.3.

518. Wilson v. Beebe, 770 F.2d 578, 590 (6th Cir. 1985) (en banc) (emphasis added).

519. *See, e.g.*, Filley v. Kickoff Publishing Co., 454 F.2d 1288, 1291 (6th Cir. 1972).

520. Doherty v. Southern College of Optometry, 862 F.2d 570, 576 (6th Cir. 1988) (rule of deference applies "especially when as here that judge served as a state trial judge before appointment to the federal bench"); Agristor Leasing v. Saylor, 803 F.2d 1401, 1407 (6th Cir. 1986) (noting that district judge "was a Tennessee circuit judge . . . and engaged in private practice in Tennessee for more than 20 years"); Louisville & Jefferson County Metro. Sewer Dist. v. Travelers Ins. Co., 753 F.2d 533, 540 (6th Cir. 1985).

521. Diminnie v. United States, 728 F.2d 301, 306 (6th Cir.), *cert. denied*, 469 U.S. 842 (1984).

522. 761 F.2d 252 (6th Cir. 1985).

appellate courts, should be given considerable weight.[523]

SEVENTH CIRCUIT

At least thirty-five reported cases in the Seventh Circuit have endorsed the rule of deference in some form. The Seventh Circuit usually affords "great weight,"[524] "substantial weight,"[525] "substantial deference,"[526] "significant deference,"[527] or "considerable deference"[528] to state law rulings of district court judges. The court in other cases has said that it gives such rulings "weight,"[529] "deference,"[530] "some deference,"[531] or "some though of course not complete deference."[532] The court has stated that it will "defer to"[533] or "respect"[534]

523. *Id.* at 258.

524. *See, e.g.*, Toro Co. v. Krouse, Kern & Co., 827 F.2d 155, 160 (7th Cir. 1987); *In re* Air Crash Disaster Near Chicago, Ill. 701 F.2d 1189, 1195 (7th Cir.), *cert. denied*, 464 U.S. 866 (1983); Lamb v. Briggs Mfg., 700 F.2d 1092, 1094 (7th Cir. 1983); Murphy v. White Hen Pantry Co., 691 F.2d 350, 354 (7th Cir. 1982); Buehler Corp. v. Home Ins. Co., 495 F.2d 1211, 1214 (7th Cir. 1974).

525. *See, e.g.*, Rush Presbyterian St. Luke's Medical Center v. Safeco Ins. Co. of Am., 825 F.2d 1204, 1206 (7th Cir. 1987); Beard v. J.I. Case Co., 823 F.2d 1095, 1098 n.3 (7th Cir. 1987); City of Clinton v. Moffitt, 812 F.2d 341, 342 (7th Cir. 1987); Johnson v. Consolidated Rail Corp., 797 F.2d 1440, 1446 (7th Cir. 1986); Palace Entertainment, Inc. v. Bituminous Casualty Corp., 793 F.2d 842, 846 (7th Cir. 1986); Mucha v. King, 792 F.2d 602, 604 (7th Cir. 1986); Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1370 (7th Cir. 1985).

526. *See, e.g.*, Smith v. Sno Eagles Snowmobile Club, 823 F.2d 1193, 1195 (7th Cir. 1987); Evans v. Fluor Distrib. Cos., 799 F.2d 364, 368-69 (7th Cir. 1986); Goldstick v. ICM Realty, 788 F.2d 456, 466 (7th Cir. 1986).

527. *See* Mutual Serv. Casualty Ins. Co. v. Country Life Ins. Co., 859 F.2d 548, 551 (7th Cir. 1988).

528. *See, e.g.*, Fontano v. City of Chicago, 820 F.2d 213, 215 (7th Cir. 1987) (per curiam).

529. *See, e.g.*, St. Joseph Bank & Trust Co. v. United States, 716 F.2d 1180, 1182 (7th Cir. 1983).

530. *See* Blachowski v. Royal Indem. Co., 526 F.2d 836, 837 (7th Cir. 1975); *see also* Moore v. Tandy Corp., 819 F.2d 820, 823 (7th Cir. 1987) (stating policy of deferring); Morin Bldg. Prods. Co. v. Baystore Constr., Inc., 717 F.2d 413, 416-17 (7th Cir. 1983) (stating deference is prudent).

531. *See, e.g.*, Anderson v. Marathon Petroleum Co., 801 F.2d 936, 938 (7th Cir. 1986); *see also* Instituto Nacional de Commercializacion Agricola v. Continental Ill. Nat'l Bank & Trust Co., 858 F.2d 1264, 1268 (7th Cir. 1988) (affording "some, but not total, deference"); Phelps v. Sherwood Medical Indus., 836 F.2d 296, 300 (7th Cir. 1987) (affording "some deference").

532. *E.g.*, Max M. v. New Trier High School Dist. No. 203, 859 F.2d 1297, 1300 (7th Cir. 1988) (citing Small v. Sheba Investors, Inc., 811 F.2d 1163, 1164 (7th Cir. 1987)); Sarnoff v. American Home Prods. Corp., 798 F.2d 1075, 1080 (7th Cir. 1986) (citing Enis v. Continental Ill. Nat'l Bank & Trust Co., 795 F.2d 39, 40 (7th Cir. 1986)).

533. *See* Moore v. Tandy Corp., 819 F.2d 820, 823 (7th Cir. 1987).

534. *See In re* Erickson, 815 F.2d 1090, 1095 (7th Cir. 1987); *see also* Lake

state law rulings and that "the considered view of the District Judge will be accepted as to doubtful questions of local law."[535] Thus, the Seventh Circuit considers the rule of deference significant, at least in cases of "substantial doubt."[536]

Although the Seventh Circuit has rejected the "clearly erroneous" view of the rule of deference, earlier cases flirted with such review, citing "the deference given by reviewing courts to a district judge's interpretation of the law of the state where he sits unless clearly wrong or unreasonable."[537] In *Beard v. J.I. Case Co.*,[538] however, the court stated that "we have never held that the deference due district court decisions construing state law is so great that such decisions may only be overturned based on a finding that they are clearly erroneous."[539]

Like other circuits, the Seventh Circuit has justified the rule of deference on the basis of district court expertise. In *Beard*, for example, the court stated: "We give weight to these decisions because we presume that a district judge is likely to have a special familiarity with the law of the state in which he or she sits."[540] *In re Erickson*,[541] however, suggested a more unorthodox rationale, justifying the rule as a "tie-breaker."[542] As Judge Easterbrook stated for the court, "[t]he law has need of tie-breakers, and if this case be a tie (it comes close), the nod goes to the district court's construction."[543] Other Seventh Circuit cases, particularly early cases, have supported application

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River Corp. v. Carborundum Co., 769 F.2d 1284, 1290 (7th Cir. 1985) (giving "respectful consideration" to district court ruling).

535. Wisconsin Screw Co. v. Fireman's Fund Ins. Co., 297 F.2d 697, 701 (7th Cir. 1962); Shackleton v. Food Mach. & Chem. Corp., 279 F.2d 919, 922 (7th Cir. 1960).

536. *In re Erickson*, 815 F.2d at 1094; *see also* White v. United States, 680 F.2d 1156, 1162 (7th Cir. 1982) (applying rule because "this is a close and difficult question").

537. Cameron v. Law (*In re* Tillman Produce Co.), 538 F.2d 763, 765 (7th Cir. 1976); *see* Mitchell v. Archibald & Kendall, Inc., 573 F.2d 429, 433 (7th Cir. 1978); *see also* Kalmich v. Bruno, 553 F.2d 549, 552 (7th Cir.) (stating that court has "no particular quarrel" with assertion that state law ruling should stand "unless there is a firm conviction that it was clearly erroneous"), *cert. denied*, 434 U.S. 940 (1977).

538. 823 F.2d 1095 (7th Cir. 1987).

539. *Id.* at 1098 n.3; *accord* Lake River Corp. v. Carborundum Co., 769 F.2d 1284, 1290 (7th Cir. 1985); *see also White*, 680 F.2d at 1162 (stating that "parties are entitled to a review of the trial court's determination of state law just as they are of any other legal question in a case").

540. 823 F.2d at 1097.

541. 815 F.2d 1090 (7th Cir. 1987).

542. *Id.* at 1095.

543. *Id.*

of the rule of deference by citing Supreme Court authority.[544]

Whatever its rationale, in the Seventh Circuit the rule of deference applies to all "parts of the law of [the] state,"[545] and regardless of the procedural posture of the case. Thus, the circuit has invoked the rule in reviewing state law determinations in orders disposing of motions to dismiss,[546] conclusions of law made after trials to the court,[547] summary judgments,[548] directed verdicts,[549] and rulings on requests for jury instructions.[550]

The court also has suggested that the rule may carry heightened effect in particular cases. In one case, for example, the court stated that "where the district court's decision on the content of state law is the product of a comprehensive, well-reasoned and carefully-crafted opinion, we should be especially mindful of this principle."[551] In another case, the court noted that "[t]his precept is especially *apropos* in a case such as this where the district judge is a former judge of that state's courts."[552] On occasion, the court also has noted the specialized experience of the trial judge.[553] Most notably, in *Goldstick v.*

544. *See, e.g.*, Lamb v. Briggs Mfg., 700 F.2d 1092, 1094 (7th Cir. 1983) (citing Bernhardt v. Polygraphic Corp. of Am., 350 U.S. 198, 203-04 (1955)); Blachowski v. Royal Indem. Co. 526 F.2d 836, 837 (7th Cir. 1975) (also citing *Bernhardt*).

545. Beard v. J.I. Case Co., 823 F.2d 1095, 1098 (7th Cir. 1987) (holding rule applicable to choice-of-law issues).

546. *See. e.g.*, Rush Presbyterian St. Luke's Medical Center v. Safeco Ins. Co. of Am., 825 F.2d 1204, 1206-07 (7th Cir. 1987); Fontano v. City of Chicago, 820 F.2d 213, 213 (7th Cir. 1987) (per curiam).

547. *See, e.g.*, Moore v. Tandy Corp., 819 F.2d 820, 823 (7th Cir. 1987).

548. *See, e.g.*, City of Clinton v. Moffitt, 812 F.2d 341, 342 (7th Cir. 1987); Evans v. Fluor Distribution Cos., 799 F.2d 364, 365 (7th Cir. 1986); Goldstick v. ICM Realty, 788 F.2d 456, 458 (7th Cir. 1986). In *Murphy v. White Hen Pantry Co.*, 691 F.2d 350 (7th Cir. 1982), the court, citing the rule of deference in affirming the district court's award of summary judgment, distinguished a federal law case suggesting that "courts must proceed conservatively with summary judgment where novel or important questions of law are presented." *Id.* at 354.

549. *See, e.g.*, Anderson v. Marathon Petroleum Co., 801 F.2d 936, 938 (7th Cir. 1986).

550. *See, e.g.*, Morin Bldg. Prods. Co. v. Baystone Constr., Inc., 717 F.2d 413, 414 (7th Cir. 1983).

551. Toro Co. v. Krouse, Kern & Co., 827 F.2d 155, 160 (7th Cir. 1987); *see also* Wolf v. City of Fitchburg, 870 F.2d 1327, 1330 (7th Cir. 1989) (deferring to district court's determinations of state property law, "particularly those based on complex and seldom-interpreted provisions of state and local enactments").

552. City of Clinton v. Moffitt, 812 F.2d 341, 342 (7th Cir. 1987).

553. *See Morin Bldg. Prods.*, 717 F.2d at 417 (noting that district judge was "an experienced Indiana lawyer"); White v. United States, 680 F.2d 1156, 1162

ICM Realty,[554] a statute of frauds case, the court found the rule "especially applicable . . . given Judge Shadur's long experience in commercial practice in Illinois before his appointment to the bench."[555] Finally, the court has said that "[d]eference is particularly appropriate where the state's supreme court has not spoken to the issue and the intermediate appellate courts are divided," without suggesting why such cases differ from other difficult cases.[556]

The court also has recognized limits on the rule. In one case the court stated that "[a]lthough we give substantial weight to the interpretation of state law by a district judge who sits in that state, we cannot give it controlling weight; the parties are entitled to judicial review."[557] In a few cases, the court has added that "we do not merely rubber-stamp the district judge's determination of state law"[558] and that the "parties are entitled to a review of the trial court's determination of state law just as they are of any other legal question in a case."[559]

The Seventh Circuit also has been a fertile source of specific exceptions to the rule of deference. The rule, of course, applies "where state courts have not previously addressed an issue."[560] The court has said, however, that the rule has limited

(7th Cir. 1982) (giving great weight to trial judge's decision, "particularly in light of his more than thirty years on the federal bench in Indiana").

554. 788 F.2d 456 (7th Cir. 1986).

555. *Id.* at 466.

556. Enis v. Continental Ill. Nat'l Bank & Trust Co., 795 F.2d 39, 40 (7th Cir. 1986); *accord* Instituto Nactional de Commercializacion Agricola v. Continental Ill. Nat'l Bank & Trust Co., 858 F.2d 1264, 1267 (7th Cir. 1987) (affording "some, but not total, deference . . . 'especially where the state's supreme court has not spoken to the issue and the intermediate appellate courts are divided' ") (citing *Enis*, 795 F.2d at 40). In a similar vein, the court has said that " '[d]eference is particularly appropriate where the state's Supreme Court has not spoken to the issue.' " Fontano v. City of Chicago, 820 F.2d 213, 215 (7th Cir. 1987) (per curiam) (citing *Enis*, 795 F.2d at 40). This statement seems misleading, if not wrong, because the rule does not apply *at all* if the state's Supreme Court *has* spoken to the issue at hand.

557. Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1370 (7th Cir. 1985) (citations omitted); *accord* Palace Entertainment, Inc. v. Bituminous Casualty Corp., 793 F.2d 842, 846 (7th Cir. 1986) (citing *Afram*, 772 F.2d at 1370).

558. City of Clinton v. Moffitt, 812 F.2d 341, 342 (7th Cir. 1987) (adding that court must reverse if "in strong disagreement").

559. Buehler Corp. v. Home Ins. Co., 495 F.2d 1211, 1214 (7th Cir. 1974); *accord* Beard v. J.I. Case Co., 823 F.2d 1095, 1098 n.3 (7th Cir. 1987) (citing *Afram*); *Palace Entertainment*, 793 F.2d at 846 (citing *Afram*); *Afram*, 772 F.2d at 1370 (overturning district court ruling where "fairly plain" that error occurred).

560. Murphy v. White Hen Pantry Co., 691 F.2d 350, 354 (7th Cir. 1982).

or no application when:

(1) The local district court judge applies nonlocal law;[561]

(2) Different resident district court judges have reached different results on the issue presented;[562] or

(3) Other district court judges have rejected the state law ruling and key state court decisions have come down after the district court ruled.[563]

In *In re Air Crash Disaster Near Chicago, Illinois*,[564] the Seventh Circuit stated that "in the circumstances of this case less than the usual deference may be due because the district court confessed its own uncertainty when it certified this interlocutory appeal."[565] Finally, in *Hartford Casualty Insurance Co. v. Argonaut-Midwest Insurance Co.*,[566] the court observed:

> [T]his precept has little force in the present case. There are no Illinois cases on point; the district court judge did not discuss such Illinois cases as might bear on the question although not dictate the answer; and the parties, in their search for authority, have ranged over the whole United States.[567]

EIGHTH CIRCUIT

The Eighth Circuit was the first circuit to adopt the rule of deference. In 1943, in *Magill v. Travelers Insurance Co.*,[568] the court stated that it would accord "great weight . . . to the view of the trial court" on matters of state law and reverse only if "convinced of error."[569] Since 1943, the Eighth Circuit has produced many more decisions citing the rule than any other circuit; this study uncovered more than 280 cases. The Eighth Circuit has cited the rule in cases involving contract law,[570]

561. *See Beard*, 823 F.2d at 1098; *see also* Kalmich v. Bruno, 553 F.2d 549, 552 (7th Cir.) (stating that despite rule of deference, "we regard the matter of foreign country law as purely a 'question of law,' . . . the resolution of which we are free to arrive at on the basis of our own independent research and analysis"), *cert. denied*, 434 U.S. 940 (1977).

562. *See* Fontano v. City of Chicago, 820 F.2d 213, 215 (7th Cir. 1987) (per curiam).

563. *See* Enis v. Continental Ill. Nat'l Bank & Trust Co., 795 F.2d 39, 40 (7th Cir. 1986).

564. 701 F.2d 1189 (7th Cir.), *cert. denied*, 464 U.S. 866 (1983).

565. *Id.* at 1195.

566. 854 F.2d 279 (7th Cir. 1988).

567. *Id.* at 281.

568. 133 F.2d 709 (8th Cir.), *cert denied*, 319 U.S. 773 (1943).

569. *Id.* at 713.

570. *See, e.g.*, Havens Steel Co. v. Randolph Eng'g Co., 813 F.2d 186, 186

warranty claims,[571] banking law,[572] bankruptcy,[573] corporate law,[574] and insurance law.[575] Decisions in tort actions also have cited the rule, including with respect to products liability,[576] wrongful death,[577] libel,[578] intentional infliction of emotional distress,[579] medical malpractice,[580] loss of consortium,[581] personal injury,[582] and guest statutes.[583] Panels have applied the

(8th Cir. 1987); Gary Braswell & Assocs. v. Piedmont Indus., 773 F.2d 987, 989 (8th Cir. 1985); Gatzemeyer v. Vogel, 544 F.2d 988, 992 (8th Cir. 1976); Western Oil & Fuel Co. v. Kemp, 245 F.2d 633, 645 (8th Cir. 1957).

571. *See, e.g.*, Gold'n Plump Poultry, Inc. v. Simmons Eng'g Co., 805 F.2d 1312, 1315 (8th Cir. 1986); Northern States Power Co. v. ITT Meyer Indus., 777 F.2d 405, 413 (8th Cir. 1985); Tharalson v. Pfizer Genetics, Inc., 728 F.2d 1108, 1111 (8th Cir. 1984).

572. *See, e.g.*, Commercial Credit Corp. v. Empire Trust Co., 260 F.2d 132, 135 (8th Cir. 1958); *see also, e.g.*, Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 491 F.2d 192, 194 (8th Cir. 1974) (stating that although court gives great weight to district court, it is not bound by lower court ruling).

573. *See, e.g.*, O'Brien v. Heggen, 705 F.2d 1001, 1003 (8th Cir. 1983); *In re* Schwen's, Inc., 693 F.2d 48, 49 (8th Cir. 1982); Merchants Mut. Bonding Co. v. Appalachian Ins. Co., 556 F.2d 899, 902 (8th Cir. 1977); Michealson v. Elliott, 209 F.2d 625, 626 (8th Cir. 1954).

574. *See, e.g.*, Honigman v. Green Giant Co., 309 F.2d 667, 670 (8th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963); *see also, e.g.*, Shidler v. All Am. Life & Fin. Corp., 775 F.2d 917, 920 (8th Cir. 1985) (according great weight to district court, but refusing to be bound by it).

575. *See, e.g.*, Hilt Truck Lines v. Riggins, 756 F.2d 676, 678 (8th Cir. 1985); Freeman v. Schmidt Real Estate & Ins., Inc., 755 F.2d 135, 137 (8th Cir. 1985); Glover v. Metropolitan Life Ins. Co., 698 F.2d 947, 949 (8th Cir. 1983); Jump v. Goldenhersh, 619 F.2d 11, 15 (8th Cir. 1980); Blevins v. Commercial Standard Ins. Co., 544 F.2d 967, 971 (8th Cir. 1976); St. Paul Fire & Marine Ins. Co. v. Northern Grain Co., 365 F.2d 361, 368 (8th Cir. 1966); Milwaukee Ins. Co. v. Kogen, 240 F.2d 613, 615 (8th Cir. 1957).

576. *See, e.g.*, King v. Nashua Corp., 763 F.2d 332, 334 (8th Cir. 1985); Sherrill v. Royal Indus., 526 F.2d 507, 510 (8th Cir. 1975).

577. *See, e.g.*, Zrust v. Spencer Foods, Inc., 667 F.2d 760, 764 (8th Cir. 1982); Koppinger v. Cullen-Schiltz & Assocs., 513 F.2d 901, 909 (8th Cir. 1975); Halvorsen v. Dunlap, 495 F.2d 817, 821 (8th Cir. 1974); Chicago & N.W. Ry. v. Bork, 223 F.2d 652, 657 (8th Cir. 1955).

578. *See, e.g.*, Schuster v. U.S. News and World Report, Inc., 602 F.2d 850, 854 (8th Cir. 1979); Luster v. Retail Credit Co., 575 F.2d 609, 614 (8th Cir. 1978); Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830, 836 (8th Cir. 1974).

579. *See, e.g.*, Orlando v. Alamo, 646 F.2d 1288, 1290-91 (8th Cir. 1981).

580. *See, e.g.*, Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978); Owens v. Childrens Memorial Hosp., 480 F.2d 465, 467 (8th Cir. 1973); Linke v. Sorenson, 276 F.2d 151, 155 (8th Cir. 1960).

581. *See, e.g.*, Wyatt v. United States, 610 F.2d 545, 546 (8th Cir. 1979); McPherson v. Sunset Speedway, Inc., 594 F.2d 711, 714 (8th Cir. 1979).

582. *See, e.g.*, *McPherson*, 594 F.2d at 714; W. Hodgman & Sons v. Motis, 268 F.2d 82, 86 (8th Cir. 1959); Luther v. Maple, 250 F.2d 916, 922 (8th Cir. 1958); Northern Liquid Gas Co. v. Hildreth, 180 F.2d 330, 336 (8th Cir. 1950).

583. *See, e.g.*, Aguilar v. Flores, 549 F.2d 1161, 1163 (8th Cir. 1977); Sloan v.

rule in property,[584] estate,[585] and estate tax[586] cases as well.

The Eighth Circuit has justified the rule of deference with the traditional expertise rationale. For example, in *Bookwalter v. Phelps*,[587] the court stated that "an able and experienced federal trial judge, residing in the state, by reason of his close association with the development of the law of the state is ordinarily in a better position to predict the course the appellate courts of his state will follow."[588] Speaking of the rule of deference in *Kasper v. Kellar*,[589] the court expanded on this theme, stating that "factors of evaluation and judgment on unsettled questions will naturally be present at the local level, which are not available to us, such as unreported trial-court decisions, percolating judicial trends, accepted legal climate, and familiarity with prevailing professional thought and temper."[590]

From 1943 until the court reconsidered the rule in *Luke v. American Family Mutual Insurance Co.*[591] in 1973, Eighth Circuit panels expressed the rule in a wide variety of ways. Most often, the court stated broadly that appellate panels would not alter any "permissible conclusion" of state law reached by the district courts.[592] In some cases, the court added that if the con-

Tarlton, 285 F.2d 575, 578 (8th Cir. 1961); Ortman v. Smith, 198 F.2d 123, 127 (8th Cir.), *cert. denied*, 344 U.S. 856 (1952).

584. *See, e.g.*, Kimble v. Willey, 204 F.2d 238, 239 (8th Cir. 1953); National Bellas Hess, Inc. v. Kalis, 191 F.2d 739, 741 (8th Cir. 1951), *cert. denied*, 342 U.S. 933 (1952); *see also* Hockett v. Larson, 742 F.2d 1123, 1125 (8th Cir. 1984) (deferring customarily to district court views, but refusing to be bound by them).

585. *See, e.g.*, Bassler v. Arrowood, 500 F.2d 138, 142 n.7 (8th Cir. 1974), *cert. denied*, 419 U.S. 1116 (1975); Cousin v. Cousin, 192 F.2d 377, 387 (8th Cir. 1951).

586. *See, e.g.*, Hunter v. United States, 624 F.2d 833, 837 (8th Cir. 1980); United States v. Goodson, 253 F.2d 900, 903 (8th Cir. 1958); Kasper v. Kellar, 217 F.2d 744, 747 (8th Cir. 1954).

587. 325 F.2d 186 (8th Cir. 1963).

588. *Id.* at 188.

589. 217 F.2d 744 (8th Cir. 1954).

590. *Id.* at 747-48.

591. 476 F.2d 1015 (8th Cir. 1972), *aff'd en banc*, 476 F.2d 1023 (8th Cir.), *cert. denied*, 414 U.S. 856 (1973).

592. *See, e.g.*, Cargill, Inc. v. Zimmer, 374 F.2d 924, 929 (8th Cir. 1967); H.K. Porter Co. v. Wire Rope Corp. of Am., 367 F.2d 653, 662 (8th Cir. 1966); Carman v. Harrison, 362 F.2d 694, 701 (8th Cir. 1966); General Am. Life Ins. Co. v. Yarbrough, 360 F.2d 562, 568 (8th Cir. 1966); Johnston v. Cartwright, 355 F.2d 32, 38 (8th Cir. 1966); Montgomery Ward & Co. v. Steele, 352 F.2d 822, 826 (8th Cir. 1965); Hedberg v. State Farm Mut. Auto. Ins. Co., 350 F.2d 924, 932-33 (8th Cir. 1965); Baker v. United States, 343 F.2d 222, 224 (8th Cir. 1965); Greif Bros. Cooperage Corp. v. United States Gypsum Co., 341 F.2d 167, 171 (8th Cir. 1965); Weir v. United States, 339 F.2d 82, 86-87 (8th Cir. 1964); Solomon v. Northwestern State Bank, 327 F.2d 720, 723 (8th Cir. 1964); Figge Auto Co. v. Taylor, 325

clusion was permissible, the court would not reverse even if it thought the law was different.[593] Eighth Circuit panels often said that they would not overturn lower court determinations unless convinced that the holding was erroneous or in error.[594]

F.2d 899, 901 (8th Cir. 1964); State Farm Mut. Auto. Ins. Co. v. Pennington, 324 F.2d 340, 342 (8th Cir. 1963); Cox v. City of Freeman, 321 F.2d 887, 893 (8th Cir. 1963); Jennings v. McCall Corp., 320 F.2d 64, 70 (8th Cir. 1963); Weisser v. Otter Tail Power Co., 318 F.2d 375, 377 (8th Cir. 1963); Western Casualty & Sur. Co. v. Herman, 318 F.2d 50, 53 (8th Cir. 1963); Campbell v. Village of Silver Bay, 315 F.2d 568, 575 (8th Cir. 1963); Cannon v. Travelers Indem. Co., 314 F.2d 657, 664 (8th Cir. 1963); Davis v. Liberty Mut. Ins. Co., 308 F.2d 709, 711 (8th Cir. 1962); State Sec. Co. v. Federated Mut. Implement & Hardware Ins. Co., 308 F.2d 452, 452 (8th Cir. 1962) (per curiam); Reid v. Miles Constr. Corp., 307 F.2d 214, 219 (8th Cir. 1962); Krone v. Lacy, 305 F.2d 245, 248 (8th Cir. 1962); St. Paul Hosp. & Casualty Co. v. Helsby, 304 F.2d 758, 759 (8th Cir. 1962) (per curiam); James Talcott, Inc. v. Associates Discount Corp., 302 F.2d 443, 449 (8th Cir. 1962); Mothner v. Ozark Real Estate Co., 300 F.2d 617, 620 (8th Cir. 1962); Sears, Roebuck & Co. v. Daniels, 299 F.2d 154, 156 (8th Cir. 1962); Wolters v. Prudential Ins. Co. of Am., 296 F.2d 140, 141 (8th Cir. 1961); Transport Mfg. & Equip. Co. v. Fruehauf Trailer Co., 295 F.2d 223, 227 (8th Cir. 1961); Archer-Daniels-Midland Co. v. Paull, 293 F.2d 389, 397 (8th Cir. 1961); Kern v. Prudential Ins. Co. of Am., 293 F.2d 251, 255 (8th Cir. 1961), *cert. denied*, 368 U.S. 969 (1962); Travelers Indem. Co. v. National Indem. Co., 292 F.2d 214, 220 n.3 (8th Cir. 1961); Village of Brooten v. Cudahy Packing Co., 291 F.2d 284, 288 (8th Cir. 1961); Taube v. Ingraham, 290 F.2d 288, 295 (8th Cir. 1961); State Bank v. Maryland Casualty Co., 289 F.2d 544, 547 (8th Cir. 1961); Glawe v. Rulon, 284 F.2d 495, 497 (8th Cir. 1960); Texaco-Cities Serv. Pipe Line Co. v. Aetna Casualty & Sur. Co., 283 F.2d 912, 914 (8th Cir. 1960); Linke v. Sorenson, 276 F.2d 151, 155 (8th Cir. 1960); W. Hodgman & Sons v. Motis, 268 F.2d 82, 86 (8th Cir. 1959); Webb v. John Deere Plow Co., 260 F.2d 850, 852 (8th Cir. 1958); Commercial Credit Corp. v. Empire Trust Co., 260 F.2d 132, 135 (8th Cir. 1958); Homolla v. Gluck, 248 F.2d 731, 734 (8th Cir. 1957); Wood v. Gas Serv. Co., 245 F.2d 653, 657 (8th Cir.), *cert. denied*, 355 U.S. 885 (1957); Milwaukee Ins. Co. v. Kogen, 240 F.2d 613, 615 (8th Cir. 1957); Bostian v. Universal C.I.T. Credit Corp., 238 F.2d 809, 812 (8th Cir. 1956); Wallace v. Knapp-Monarch Co., 234 F.2d 853, 857 (8th Cir. 1956); Dierks Lumber & Coal Co. v. Barnett, 221 F.2d 695, 697 (8th Cir. 1955); Pacific Employers Ins. Co. v. Nance, 212 F.2d 4, 8 (8th Cir. 1954); Ford v. Luria Steel & Trading Corp., 192 F.2d 880, 883 (8th Cir. 1951); National Bellas Hess, Inc. v. Kalis, 191 F.2d 739, 741 (8th Cir. 1951), *cert. denied*, 342 U.S. 933 (1952); John Hancock Mut. Life Ins. Co. v. Munn, 188 F.2d 1, 4 (8th Cir. 1951); Western Casualty & Sur. Co. v. Coleman, 186 F.2d 40, 43 (8th Cir. 1951).

593. *See, e.g., Krone v. Lacy*, 305 F.2d at 248; *National Bellas Hess*, 191 F.2d at 741; *Western Casualty & Sur. Co. v. Coleman*, 186 F.2d at 43.

594. *See, e.g.*, Wessel v. Prudential Ins. Co. of Am., 361 F.2d 571, 574 (8th Cir. 1966); Honigman v. Green Giant Co., 309 F.2d 667, 670 (8th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963); Wray M. Scott Co. v. Daigle, 309 F.2d 105, 109 (8th Cir. 1962); Minnesota Amusement Co. v. Larkin, 299 F.2d 142, 153 (8th Cir. 1962); Greene v. Werven, 275 F.2d 134, 137 (8th Cir. 1960); Community Fed. Sav. & Loan Ass'n v. General Casualty Co. of Am., 274 F.2d 620, 623 (8th Cir. 1960); Weiby v. Farmers Mut. Auto. Ins. Co., 273 F.2d 327, 331 (8th Cir. 1960); Illinois Cent. R.R. v. Stufflebean, 270 F.2d 801, 806 (8th Cir. 1959); Woodhull v. Minot Clinic, 259 F.2d 676, 678 (8th Cir. 1958); Grundeen v. United States Fi-

On several occasions, the court employed the "clearly erroneous" standard.[595] Pre-*Luke* opinions sometimes said that state law rulings should stand unless it was clear that the court had "misconceived" or "misapplied" the law of the state.[596] In other cases the appeals court stated that it would "accept" the

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delity & Guar. Co., 238 F.2d 750, 753 (8th Cir. 1956); Warner v. First Nat'l Bank, 236 F.2d 853, 860 (8th Cir.), *cert. denied*, 352 U.S. 927 (1956); Frank B. Connet Lumber Co. v. New Amsterdam Casualty Co., 236 F.2d 117, 125 (8th Cir. 1956); Wallace v. Knapp-Monarch Co., 234 F.2d 853, 857 (8th Cir. 1956); Chicago & N.W. Ry. v. Bork, 223 F.2d 652, 657 (8th Cir. 1955); American Nat'l Bank v. National Indem. Co., 222 F.2d 513, 519 (8th Cir. 1955); Lanza v. Carroll, 216 F.2d 808, 814 (8th Cir. 1954), *rev'd on other grounds*, 349 U.S. 408 (1955); Bryant v. Chicago Mill & Lumber Co., 216 F.2d 727, 734 (8th Cir. 1954); Clarke Hybrid Corn Co. v. Stratton Grain Co., 214 F.2d 7, 9 (8th Cir. 1954); Kansas City Public Serv. Co. v. Taylor, 210 F.2d 3, 5 (8th Cir. 1954); Barnard v. Wabash R.R., 208 F.2d 489, 493 (8th Cir. 1953); Illinois Terminal R.R. v. Creek, 207 F.2d 475, 479 (8th Cir. 1953); Coca Cola Bottling Co. v. Hubbard, 203 F.2d 859, 861 (8th Cir. 1953); Audiss v. Peter Kiewit Sons Co., 190 F.2d 238, 241 (8th Cir. 1951); Buder v. Becker, 185 F.2d 311, 315 (8th Cir. 1950); Fireman's Fund Ins. Co. v. Vermes Credit Jewelry, Inc., 185 F.2d 142, 146 (8th Cir. 1950); Fargo Nat'l Bank v. Agricultural Ins. Co., 184 F.2d 676, 683 (8th Cir. 1950); Maryland Casualty Co. v. Dalton Coal & Material Co., 184 F.2d 181, 183 (8th Cir. 1950); Nolley v. Chicago, M., St. P. & Pac. R.R., 183 F.2d 566, 572 (8th Cir. 1950), *cert. denied*, 340 U.S. 913 (1951); *see also* Lowes v. Pan-American Life Ins. Co., 355 F.2d 433, 436 (8th Cir. 1966) (using "demonstrably wrong" standard); United States v. Goodson, 253 F.2d 900, 903 (8th Cir. 1958) (same).

595. *See, e.g.*, Universal Underwriters Ins. Co. v. Wagner, 367 F.2d 866, 873 (8th Cir. 1966); Hogue v. Pellerin Laundry Mach. Sales Co., 353 F.2d 772, 776 (8th Cir. 1965); Trans World Airlines v. Travelers Indem. Co., 262 F.2d 321, 327 (8th Cir. 1959); *see also* Western Oil & Fuel Co. v. Kemp, 245 F.2d 633, 645 (8th Cir. 1957) (using "clearly persuaded" of error standard); State Mut. Life Assurance Co. v. Wittenberg, 239 F.2d 87, 91 (8th Cir. 1956) (using "clear error" standard); Madison County Farmers Ass'n v. American Employers' Ins. Co., 209 F.2d 581, 586 (8th Cir. 1954) (using "clearly convinced" of error standard); Mogis v. Lyman-Richey Sand & Gravel Corp., 189 F.2d 130, 134 (8th Cir.), *cert. denied*, 342 U.S. 877 (1951) (same).

596. *See, e.g.*, Harris v. Hercules, Inc., 455 F.2d 267, 269 (8th Cir. 1972) (per curiam); Walker Transp. Co. v. Neylon, 396 F.2d 558, 564 (8th Cir. 1968); State Farm Mut. Auto. Ins. Co. v. Jackson, 346 F.2d 484, 490 (8th Cir. 1965); Bookwalter v. Phelps, 325 F.2d 186, 188 (8th Cir. 1963); Southern Farm Bureau Casualty Ins. Co. v. Mitchell, 312 F.2d 485, 496 (8th Cir. 1963); Billings v. Investment Trust, 309 F.2d 681, 685 (8th Cir. 1962); Phoenix Assurance Co. v. City of Buckner, 305 F.2d 54, 57 (8th Cir.), *cert. denied*, 371 U.S. 903 (1962); Charter Oak Fire Ins. Co. v. Mann, 304 F.2d 166, 167-68 (8th Cir. 1962) (per curiam); Burkhardt v. Bates, 296 F.2d 315, 316 (8th Cir. 1962) (per curiam); Sloan v. Tarlton, 285 F.2d 575, 578 (8th Cir. 1961); Knapp v. Styer, 280 F.2d 384, 391 (8th Cir. 1960); Knight v. Cameron Joyce & Co., 252 F.2d 103, 107 (8th Cir. 1958); Luther v. Maple, 250 F.2d 916, 919 (8th Cir. 1958); Citizens Ins. Co. v. Foxbilt, Inc., 226 F.2d 641, 643 (8th Cir. 1955); Riteway Carriers, Inc. v. Stuyvesant Ins. Co., 213 F.2d 576, 578 (8th Cir. 1954); Western Auto Supply Co. v. Sullivan, 210 F.2d 36, 43 (8th Cir. 1954); Ortman v. Smith, 198 F.2d 123, 127 (8th Cir.), *cert. denied*, 344 U.S. 856 (1952); Western Casualty & Sur. Co. v. Coleman, 186 F.2d 40, 43 (8th Cir. 1951).

conclusions of the lower court on doubtful questions[597] or that it would not try to "outpredict, outforecast or outguess" the district court.[598] At least two decisions added that the appellate court would not overrule the district court "except for cogent and convincing reasons."[599]

In a handful of pre-*Luke* cases, the court used terms more common in other circuits, speaking of affording "great weight"[600] or "great deference,"[601] or stating that the court would "defer"[602] to lower court rulings. Panels also stated that they would "heavily rely upon the considered appraisal" of the lower court judge[603] or act with a "hesitancy to reverse" the district judge's rulings.[604]

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597. *See, e.g.*, National Life & Accident Ins. Co. v. Graham, 301 F.2d 439, 441 (8th Cir. 1962); Central Elec. & Gas Co. v. City of Stromsburg, 289 F.2d 217, 220 (8th Cir. 1961); Elizabeth Hosp., Inc. v. Richardson, 269 F.2d 167, 170 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959); Allstate Ins. Co. v. Roberson, 217 F.2d 10, 13 (8th Cir. 1954); Guyer v. Elger, 216 F.2d 537, 540 (8th Cir. 1954), *cert. denied*, 348 U.S. 929 (1955); Michealson v. Elliott, 209 F.2d 625, 626 (8th Cir. 1954); Kimble v. Willey, 204 F.2d 238, 243 (8th Cir. 1953); Mutual Benefit Health & Accident Ass'n v. Cohen, 194 F.2d 232, 241 (8th Cir.), *cert. denied*, 343 U.S. 965 (1952); Stoll v. Hawkeye Casualty Co., 185 F.2d 96, 99 (8th Cir. 1950); Nelson v. Westland Oil Co., 181 F.2d 371, 375 (8th Cir. 1950); Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 141 (8th Cir. 1950); Traders & Gen. Ins. Co. v. Powell, 177 F.2d 660, 668 (8th Cir. 1949).

598. *See, e.g.*, Miller v. Concordia Teachers College, 296 F.2d 100, 106-07 (8th Cir. 1961); Textron, Inc. v. Homes Beautiful, Inc., 261 F.2d 646, 651 (8th Cir. 1958); Stockdale v. Olson, 261 F.2d 191, 196-97 (8th Cir. 1958); United States v. R.D. Wilmans & Sons, 251 F.2d 509, 511 (8th Cir. 1958); Homolla v. Gluck, 248 F.2d 731, 733 (8th Cir. 1957); *see also, e.g.*, MacDonald Eng'g Co. v. Hover, 290 F.2d 301, 307 (8th Cir. 1961) (using "outpredict or outforecast" language).

599. Indemnity Ins. Co. of N. Am. v. Pioneer Valley Sav. Bank, 343 F.2d 634, 644 (8th Cir. 1965); Mast v. Illinois Cent. R.R., 176 F.2d 157, 163 (8th Cir. 1949).

600. *See, e.g.*, Simpson v. Skelly Oil Co., 371 F.2d 563, 567 (8th Cir. 1967); S & L Co. v. Wood, 323 F.2d 322, 328 (8th Cir. 1963); Anthony v. Louisiana & Ark. Ry., 316 F.2d 858, 863 (8th Cir.), *cert. denied*, 375 U.S. 830 (1963); MacDonald Eng'g Co. v. Hover, 290 F.2d 301, 307 (8th Cir. 1961); Scullen v. Braunberger, 225 F.2d 10, 14 (8th Cir. 1955); Franck v. Equitable Life Ins. Co., 203 F.2d 473, 477 (8th Cir. 1953); Northern Liquid Gas Co. v. Hildreth, 180 F.2d 330, 336 (8th Cir. 1950).

601. *See, e.g.*, Cousin v. Cousin, 192 F.2d 377, 387 (8th Cir. 1951).

602. *See, e.g.*, Nordin v. May, 208 F.2d 131, 134 (8th Cir. 1953); Standard Brands, Inc. v. Bateman, 184 F.2d 1002, 1111 (8th Cir. 1950), *cert. denied*, 340 U.S. 942 (1951).

603. Hope Flooring & Lumber Co. v. Boulden, 227 F.2d 303, 305 (8th Cir. 1955); Kasper v. Kellar, 217 F.2d 744, 747 (8th Cir. 1954).

604. United States v. Fahrenkamp, 312 F.2d 627, 631 (8th Cir. 1963).

In its 1973 *Luke* decision,[605] however, the Eighth Circuit struck out in a new direction.[606] The court held that an appellate panel "cannot be irrevocably bound by a district judge's choice of . . . rules to follow in a diversity case. To hold otherwise would be to abdicate our appellate responsibility."[607] In a lengthy footnote, the court denounced the "permissible conclusion" standard and sought to clarify how the Eighth Circuit should approach the rule of deference in the future:

> We feel future adherence to the principle set forth by the Fifth Circuit more adequately reflects a court of appeals' proper course of review: "We give great weight to the view of the state law taken by the district judge experienced in the law of that state, although of course the parties are entitled to review by us of the trial court's determination of state law just as they are of any other legal question in a case."[608]

Since *Luke*, the court's expressions of the rule of deference have changed, generally suggesting that the court now affords less deference to district court rulings. The result of this changed approach is predictable. Since *Luke*, rule of deference reversals in state law cases appear to have increased substantially.[609] The "permissible conclusion" language no longer appears in the cases, and only aberrational decisions speak of "clear error" as the governing standard.[610] After *Luke*, the "great weight" standard taken from the *Luke* footnote[611] is the language the courts most often use.[612] In other cases, the court

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605. Luke v. American Family Mut. Ins. Co., 476 F.2d 1015 (8th Cir. 1972), *aff'd en banc*, 476 F.2d 1025 (8th Cir.), *cert. denied*, 414 U.S. 856 (1973).

606. *See* Carson v. National Bank of Commerce Trust & Sav., 501 F.2d 1082, 1083 (8th Cir. 1974) (noting that in *Luke* "the rule was changed").

607. *Luke*, 476 F.2d at 1019-20.

608. *Id.* at 1019 n.6 (quoting Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967)).

609. A rough, but plausible, estimate, based solely on the cases identified in this study, is that the cases in which a circuit panel overturned a state law ruling have tripled, from approximately six percent of the cases prior to *Luke* to approximately 20% after *Luke*.

610. *See, e.g.*, Brown & Root, Inc. v. Hempstead County Sand & Gravel, Inc., 767 F.2d 464, 469 (8th Cir. 1985); Crocker Nat'l Bank, Credit Alliance Corp. v. Clark Equip. Credit Corp., 724 F.2d 696, 700 (8th Cir. 1984); Rodeway Inns of Am., Inc. v. Frank, 541 F.2d 759, 767 (8th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

611. *Luke*, 476 F.2d at 1019 n.6.

612. *See, e.g.*, Union Nat'l Bank v. Federal Nat'l Mortgage Ass'n, 860 F.2d 847, 853 n.13 (8th Cir. 1988); Thompkins v. Stuttgart School Dist. No. 22, 858 F.2d 1317, 1320 (8th Cir. 1988); *id.* at 1324 (Heaney, J., dissenting); Frensley v. National Fire Ins. Co., 856 F.2d 1199, 1202 (8th Cir. 1988); Jones v. Sun Carriers, Inc., 856 F.2d 1091, 1094 (8th Cir. 1988); McMichael v. United States, 856 F.2d 1026, 1036 (8th Cir. 1988); Gleason v. Avon Prods., Inc., 850 F.2d 413, 416

notes merely that the district court's state law rulings are entitled to "deference."[613] Other Eighth Circuit cases contain vari-

(8th Cir. 1988); Freeze v. American Home Prods. Corp., 839 F.2d 415, 417 (8th Cir. 1988); Havens Steel Co. v. Randolph Eng'g Co., 813 F.2d 186, 188 (8th Cir. 1987); Camp v. Commonwealth Land Title Ins. Co., 787 F.2d 1258, 1260-61 (8th Cir. 1986); Northern States Power Co. v. ITT Meyer Indus., 777 F.2d 405, 413 (8th Cir. 1985); Shidler v. All Am. Life & Fin. Corp., 775 F.2d 917, 920 (8th Cir. 1985); Nebraska Pub. Power Dist. v. Austin Power, Inc., 773 F.2d 960, 972 (8th Cir. 1985); Jasperson v. Purolator Courier Corp., 765 F.2d 736, 739 (8th Cir. 1985); Wilson v. Sears, Roebuck & Co., 757 F.2d 948, 951 (8th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986); Keltner v. Ford Motor Co., 748 F.2d 1265, 1267 (8th Cir. 1984); Nemmers v. City of Dubuque, 716 F.2d 1194, 1197 (8th Cir. 1983); O'Brien v. Heggen, 705 F.2d 1001, 1005 (8th Cir. 1983); R. W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 821 (8th Cir. 1983); Bergstrom v. Sambo's Restaurants, Inc., 687 F.2d 1250, 1255 (8th Cir. 1982); Sperry Corp. v. City of Minneapolis, 680 F.2d 1234, 1238 (8th Cir. 1982); Zrust v. Spencer Foods, Inc., 667 F.2d 760, 764 (8th Cir. 1982); Orlando v. Alamo, 646 F.2d 1288, 1290 (8th Cir. 1981); Greenwood Ranches, Inc. v. Skie Constr. Co., 629 F.2d 518, 523 (8th Cir. 1980); Hunter v. United States, 624 F.2d 833, 837 (8th Cir. 1980); Iconco v. Jensen Constr. Co., 622 F.2d 1291, 1299 (8th Cir. 1980); Foremost Ins. Co. v. Sheppard, 610 F.2d 551, 554 (8th Cir. 1979); Wyatt v. United States, 610 F.2d 545, 546 (8th Cir. 1979) (per curiam); Lamb v. Amalgamated Labor Life Ins. Co., 602 F.2d 155, 160 (8th Cir. 1979) (per curiam); American Motorists Ins. Co. v. Samson, 596 F.2d 804, 807 (8th Cir. 1979); McPherson v. Sunset Speedway, Inc., 594 F.2d 711, 714 (8th Cir. 1979); Missouri Pac. R.R. v. Star City Gravel Co., 592 F.2d 455, 458 n.3 (8th Cir. 1979); Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978); Luster v. Retail Credit Co., 575 F.2d 609, 614 (8th Cir. 1978); Green v. American Broadcasting Cos., 572 F.2d 628, 632 (8th Cir. 1978); Lide v. Carothers, 570 F.2d 253, 256 (8th Cir. 1978); Merchants Mut. Bonding Co. v. Appalachian Ins. Co., 556 F.2d 899, 902 (8th Cir. 1977); Jamestown Farmers Elevator, Inc. v. General Mills, Inc., 552 F.2d 1285, 1294 (8th Cir. 1977); Aguilar v. Flores, 549 F.2d 1161, 1163 (8th Cir. 1977); Lincoln Carpet Mills, Inc. v. Singer Co., 549 F.2d 80, 82 (8th Cir. 1977); Northwestern Nat'l Bank v. American Beef Packers Inc. (*In re* American Beef Packers, Inc.), 548 F.2d 246, 248 (8th Cir. 1977); Gatzmeyer v. Vogel, 544 F.2d 988, 992 (8th Cir. 1976); Lienemann v. State Farm Mut. Auto Fire & Casualty Co., 540 F.2d 333, 342 (8th Cir. 1976); Sherrill v. Royal Indus., Inc., 526 F.2d 507, 510 (8th Cir. 1975); Koppinger v. Cullen-Schiltz & Assocs., 513 F.2d 901, 909 (8th Cir. 1975); Carson v. National Bank of Commerce Trust and Sav., 501 F.2d 1082, 1083 (8th Cir. 1974) (per curiam); Halvorsen v. Dunlap, 495 F.2d 817, 821 (8th Cir. 1974); Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 491 F.2d 192, 194 (8th Cir. 1974); Continental Grain Co. v. Fegles Constr. Co., 480 F.2d 793, 796 (8th Cir. 1973).

613. *See, e.g.*, Cowens v. Siemens-Elema AB, 837 F.2d 817, 823 (8th Cir. 1988); Bridgman v. Cornwell Quality Tools Co., 831 F.2d 174, 175 (8th Cir. 1987) (per curiam); Prestidge v. Prestidge, 810 F.2d 159, 161 n.3 (8th Cir. 1987); King v. Nashua Corp., 763 F.2d 332, 334 (8th Cir. 1985); Leslie v. Bolen, 762 F.2d 663, 664 (8th Cir. 1985) (per curiam); R.W. Murray Co. v. Shatterproof Glass Corp., 758 F.2d 266, 272 (8th Cir. 1985); Hilt Truck Lines v. Riggins, 756 F.2d 676, 678 (8th Cir. 1985); W.B. Farms v. Fremont Nat'l Bank & Trust Co., 756 F.2d 663, 666 (8th Cir. 1985); *In re* Speco, Inc., 750 F.2d 51, 53 (8th Cir. 1984); Slaaten v. Cliff's Drilling Co., 748 F.2d 1275, 1277 (8th Cir. 1984) (per curiam); Hockett v. Larson, 742 F.2d 1123, 1125 (8th Cir. 1984); Hickman v.

ous phrases of similar import: "substantial weight;"[614] "substantial deference;"[615] "great deference;"[616] "considerable deference;"[617] or "special weight,"[618] a term used in the body of

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Electronic Keyboarding, Inc., 741 F.2d 230, 232 (8th Cir. 1984) (per curiam); McElhaney v. Eli Lilly & Co., 739 F.2d 340, 340 (8th Cir. 1984); Tharalson v. Pfizer Genetics, Inc., 728 F.2d 1108, 1111 (8th Cir. 1984); Executive Fin. Servs., Inc. v. Garrison, 722 F.2d 417, 419 (8th Cir. 1983) (per curiam); Hollman v. Liberty Mut. Ins. Co., 712 F.2d 1259, 1261 (8th Cir. 1983); Stratioti v. Bick, 704 F.2d 1052, 1054 (8th Cir. 1983); Glover v. Metropolitan Life Ins. Co., 698 F.2d 947, 949 (8th Cir. 1983) (per curiam); *In re* Schwen's, Inc., 693 F.2d 48, 49 (8th Cir. 1982) (per curiam); Ancom, Inc. v. E. R. Squibb & Sons, Inc., 658 F.2d 650, 654 (8th Cir. 1981); Jump v. Goldenhersh, 619 F.2d 11, 15 (8th Cir. 1980); Schuster v. U.S. News & World Report, Inc., 602 F.2d 850, 854 (8th Cir. 1979); Dakota Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co., 554 F.2d 345, 354 (8th Cir.), *cert. denied*, 434 U.S. 877 (1979); Riske v. Truck Ins. Exch., 541 F.2d 768, 771 (8th Cir. 1976); Bassler v. Arrowwood, 500 F.2d 138, 142 n.7 (8th Cir. 1974), *cert. denied*, 419 U.S. 1116 (1975).

614. *See* Hegg v. United States, 817 F.2d 1328, 1330 (8th Cir. 1987); Gold'n Plump Poultry, Inc. v. Simmons Eng'g Co., 805 F.2d 1312, 1316 (8th Cir. 1986); Freeman v. Schmidt Real Estate & Ins., Inc., 755 F.2d 135, 137 (8th Cir. 1985); Grenz Super Valu v. Fix, 566 F.2d 614, 615 (8th Cir. 1977) (per curiam).

615. *See* Deupree v. Ilif, 860 F.2d 300, 305 (8th Cir. 1988); Besta v. Beneficial Loan Co., 855 F.2d 532, 533-34 (8th Cir. 1988); Imperial Oil, Inc. v. Consolidated Crude Oil Co., 851 F.2d 206, 211 (8th Cir. 1988); Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341, 344 (8th Cir. 1988); LaRo Corp. v. Big D Oil Co., 824 F.2d 689, 690 (8th Cir. 1987) (per curiam); Nelson v. Platte Valley State Bank & Trust Co., 805 F.2d 332, 334 (8th Cir. 1986); Wild v. Farrell (*In re* Wild), 795 F.2d 666, 668 (8th Cir. 1986); St. Paul Fire & Marine Ins. Co. v. Rock-Tenn Co., 787 F.2d 340, 341 (8th Cir. 1986); Union Nat'l Bank v. Farmers Bank, 786 F.2d 881, 885 (8th Cir. 1986); Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325, 1330 (8th Cir. 1985); Dabney v. Montgomery Ward & Co., 761 F.2d 494, 499 (8th Cir.), *cert. denied*, 474 U.S. 904 (1985); Mason v. Ford Motor Co., 755 F.2d 120, 122 (8th Cir. 1985); Kansas State Bank v. Citizens Bank, 737 F.2d 1490, 1496 (8th Cir. 1984); Nelson v. Missouri Div. of Family Servs., 706 F.2d 276, 278 (8th Cir. 1983); Renfroe v. Eli Lilly & Co., 686 F.2d 642, 648 (8th Cir. 1982).

616. *See* Scott v. Jones, 862 F.2d 1311, 1313 (8th Cir. 1988); Hendrickson v. Griggs, 856 F.2d 1041, 1044 (8th Cir. 1988); Rheuport v. Ferguson, 819 F.2d 1459, 1469 (8th Cir. 1987); Sterling v. Forney, 813 F.2d 191, 192 (8th Cir. 1987); Stoetzel v. Continental Textile Corp. of Am., 768 F.2d 217, 223 (8th Cir. 1985); Hartford Accident & Indem. Co. v. Stauffer Chem. Co., 741 F.2d 1142, 1145 (8th Cir. 1984); Kansas City Power & Light Co. v. Burlington N. R.R., 707 F.2d 1002, 1003 (8th Cir. 1983); Kotval v. Gridley, 698 F.2d 344, 348 (8th Cir. 1983); Lewis Serv. Center, Inc. v. Mack Fin. Corp., 696 F.2d 66, 69 n.3 (8th Cir. 1982); Howard v. Green, 555 F.2d 178, 182 (8th Cir. 1977); Blevins v. Commercial Standard Ins. Cos., 544 F.2d 967, 971 (8th Cir. 1976); Hysell v. Iowa Pub. Serv. Co., 534 F.2d 775, 780 (8th Cir. 1976); Ideal Plumbing Co. v. Benco, Inc., 529 F.2d 972, 979 (8th Cir. 1976).

617. *See* Zenco Dev. Corp. v. City of Overland, 843 F.2d 1117, 1119 (8th Cir. 1988); Parkerson v. Carrouth, 782 F.2d 1449, 1451 (8th Cir. 1986); Gary Braswell & Assocs., v. Piedmont Indus., 773 F.2d 987, 989 n.3 (8th Cir. 1985); Crew v. Dorthy (*In re* O'Neill's Shannon Village), 750 F.2d 679, 681 (8th Cir. 1984).

618. *See* Anderson v. Employers Ins., 826 F.2d 777, 779 (8th Cir. 1987); Ha-

the *Luke* opinion.[619]

Despite *Luke*, the rule of deference continues to enjoy considerable vigor in the Eighth Circuit. In particular, 1987 and 1988 cases suggest an aggressive application of the rule. Indicative of the trend is the recurring statement that the court "will overturn the district court's interpretations of [state] law *only if* we find them 'fundamentally deficient in analysis, without a reasonable basis, or contrary to a reported state-court opinion.' "[620] Although the Eighth Circuit recently has used more

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zen v. Pasley, 768 F.2d 226, 228 (8th Cir. 1985); Kizzier Chevrolet Co. v. General Motors Corp., 705 F.2d 322, 326 (8th Cir.), *cert. denied*, 464 U.S. 847 (1983); Red Lobster Inns of Am., Inc. v. Lawyers Title Ins. Corp., 656 F.2d 381, 387 n.7 (8th Cir. 1981); Bazzano v. Rockwell Int'l Corp., 579 F.2d 465, 469 (8th Cir. 1978); Melia v. Ford Motor Co., 534 F.2d 795, 799 (8th Cir. 1976); Drotzmanns, Inc. v. McGraw-Hill, Inc., 500 F.2d 830, 836 (8th Cir. 1974); Owens v. Childrens Memorial Hosp., 480 F.2d 465, 467 (8th Cir. 1973).

619. Luke v. American Family Mut. Ins. Co., 476 F.2d 1019 (8th Cir. 1972), *aff'd en banc*, 746 F.2d 1025 (8th Cir.), *cert. denied*, 414 U.S. 856 (1973).

620. Collum v. Mutual of Omaha Ins. Co., 840 F.2d 619, 621 (8th Cir. 1988) (emphasis added) (quoting McCarthy Bros. Constr. Co. v. Pierce, 832 F.2d 463, 467 (8th Cir. 1987)); *accord* Zenco Dev. Corp. v. City of Overland, 843 F.2d 1117, 1119 (8th Cir. 1988); Pony Express Cab & Bus, Inc. v. Ward, 841 F.2d 207, 209 (8th Cir. 1988) (per curiam); McCarthy Bros. Constr. Co. v. Pierce, 832 F.2d 463, 467 (8th Cir. 1987); Economy Fire & Casualty Co. v. Tri-State Ins. Co., 827 F.2d 373, 375 (8th Cir. 1987); *see also* Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341, 344 (8th Cir. 1988) (using "fundamentally deficient in analysis or otherwise lacking in reasoned authority" standard); Sparks v. Shelter Life Ins. Co., 838 F.2d 987, 990 (8th Cir. 1988) (same); Pershern v. Fiatallis N. Am., Inc., 834 F.2d 136, 138 (8th Cir. 1987) (same); Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167, 171 (8th Cir. 1987) (same); Fiedler v. Reliance Elec. Co., 823 F.2d 269, 270 n.1 (8th Cir. 1987) (same); Perkins v. Clark Equip. Co., Melrose Div., 823 F.2d 207, 208 (8th Cir. 1987); Barber-Greene Co. v. National City Bank, 816 F.2d 1267, 1270 (8th Cir. 1987) (same); Sterling v. Forney, 813 F.2d 191, 192 (8th Cir. 1987) (same).

Consider also Judge Arnold's dissent in Arthur Young & Co. v. Reves, 856 F.2d 52 (8th Cir. 1988):

> The panel's almost casual rejection of the District Court's view of Arkansas law also disturbs me. We normally defer to district judges' interpretations of the law of their own states. My own attitude when hearing appeals on such questions is roughly akin to the posture of appellate judges when reviewing question of fact. That is, I am inclined to reverse on state-law questions only when the decision below is clearly erroneous. Such a use of a question-of-fact standard is not so strange as it may first appear. Questions of foreign law are traditionally treated as questions of fact. And, while the law of a state is obviously not "foreign" to us in the same way as, say, the law of Afghanistan, a judge of a federal appellate court whose legal upbringing was in Arkansas cannot be expected to have the same instinctive feel for the law of North Dakota as a judge of that State. One can look at all the law books in print and still not have the same degree of reliable judgment on legal questions as a lawyer who has lived and practiced for years in the jurisdiction. There is such a thing as what Dean

typical post-*Luke* formulations of the rule,[621] and has continued on occasion to overturn state law rulings,[622] most recent cases indicate that a district court ruling will stand if logically explained and reasonable in result.[623]

Pound called "law in action," as opposed to "law in the books." Each State has its own distinct legal ethos which informs and qualifies how lawyers and judges understand what is written in the law books. So when we defer to the opinions of district courts on the law of their states, we are not shirking our responsibilities. We are simply using common sense.

Id. at 56 (Arnold, J., dissenting).

621. *See* Phenix Fed. Sav. & Loan Ass'n v. Shearson Loeb Rhoades, Inc., 856 F.2d 1125, 1128 (8th Cir. 1988) (referring to "the degree of deference [rulings] deserve"); Freeze v. American Home Prods. Corp., 839 F.2d 415, 417 (8th Cir. 1988) (affording "great weight"); Cowens v. Siemens-Elema AB, 837 F.2d 817, 823 (8th Cir. 1988) (affording "deference"); National Corp. for Hous. Partnership v. Liberty State Bank, 836 F.2d 433, 436 (8th Cir. 1988) (affording "substantial deference"); Goellner v. Butler, 836 F.2d 426, 433 (8th Cir. 1988) (affording "great weight"); Stevens v. Pike County Bank (*In re* Stevens), 829 F.2d 693, 695 (8th Cir. 1987) (per curiam) (distinguishing "deference" from de novo review); ANR Pipeline Co. v. Iowa State Commerce Comm'n, 828 F.2d 465, 473 (8th Cir. 1987) (affording "substantial deference"); Anderson v. Employers Ins., 826 F.2d 777, 779 (8th Cir. 1987) (affording "special weight"); Havens Steel Co. v. Randolph Eng'g Co., 813 F.2d 186, 188 (8th Cir. 1987) (affording "great weight").

622. *See* Drovers Bank v. National Bank & Trust Co., 829 F.2d 20, 23 (8th Cir. 1987) (stating that court will "usually defer"); Norwest Capital Management & Trust Co. v. United States, 828 F.2d 1330, 1344 (8th Cir. 1987) (refusing to uphold district court because ruling "overlooks the overwhelming case law"); Benedictine Sisters of St. Mary's Hosp. v. St. Paul Fire & Marine Ins. Co., 815 F.2d 1209, 1211 (8th Cir. 1987) (noting "substantial deference" standard, but reversing); Prestidge v. Prestidge, 810 F.2d 159, 161 n.3 (8th Cir. 1987) (noting "generally defer" standard, but reversing because "our study of the precedents leaves us with the definite and firm conviction that the District Court was mistaken"); *see also* Chandler v. Presiding Judge, Callaway County, 838 F.2d 977, 979 (8th Cir. 1988) (stating that court is "not bound by [district court] interpretation, and 'must reverse if we find that the district court has not correctly applied local law' ").

623. *See* Brown v. First Nat'l Bank, 844 F.2d 580, 581 (8th Cir.) (noting court's "normal practice of deferring"), *cert. dismissed*, 109 S. Ct. 20 (1988); Wilson v. Westinghouse Elec. Corp., 838 F.2d 286, 291 (8th Cir. 1988) (stating that court "accords great deference . . . and we have no adequate reason to reject [the district court's] judgment"); Bridgman v. Cornwell Quality Tools Co., 831 F.2d 174, 175 (8th Cir. 1987) (per curiam) (rejecting statutory interpretation that "is not . . . impossible" because "district judge's conclusion . . . is entirely reasonable"); LaRo Corp. v. Big D Oil Co., 824 F.2d 689, 690 (8th Cir. 1987) (per curiam) (affirming where court can "find no [state] authority which suggests that the [district] court's instruction is in error"); Barta v. Crow, 823 F.2d 251, 253 (8th Cir. 1987) (per curiam) (stating that "we normally defer . . . and we follow that practice here"); Brown v. E.W. Bliss Co., 818 F.2d 1405, 1410 n.4 (8th Cir. 1987) (stating that "because there is no reported [state] decision casting doubt on the Court's view, we defer"); Hegg v. United States, 817 F.2d 1328, 1330 (8th Cir. 1987) (stating that task is "not to adopt the construc-

A few Eighth Circuit decisions suggest that the rule may be more important in some cases than in others. In a recent case, the court noted that the "court accords substantial deference to the district court's interpretation of state law, particularly 'when considering a state statute not yet construed by the state court.' "[624] Applying the rule in other cases, the court has highlighted the experience of the district court judge,[625] the judge's prior service as a justice of the state supreme court,[626] the "painstaking consideration" given the case by the district court,[627] and even the fact that the trial judge "had the benefit of the parties' briefs."[628]

The Eighth Circuit has issued other noteworthy decisions applying the rule of deference. The court has held, for example, that the rule is applicable to decisions by United States magistrates[629] and in cases decided first by bankruptcy courts.[630] In at least two cases, the court has emphasized that the appellant could have litigated the case in state court,[631] noting that if the appellant had "desired a definitive ruling," she should have brought the action in a state court and appealed to the state supreme court.[632] Another interesting application of

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tion we think most reasonable, but simply to review the district court's determination"); *see also* Tharalson v. Pfizer Genetics, Inc., 728 F.2d 1108, 1111 (8th Cir. 1984) (stating that "we will defer to a reasonable interpretation"); *cf.* Thompkins v. Stuttgart School Dist. No. 22, 858 F.2d 1317, 1324 n.2 (8th Cir. 1988) (Heaney, J., dissenting) (stating concern "that the majority while giving lip service to [the 'great weight'] standard, here, in effect, is going back to the ['permissible conclusion'] standard rejected by this Court en banc in *Luke*").

624. National Corp. for Hous. Partnership v. Liberty State Bank, 836 F.2d 433, 436 (8th Cir. 1988) (quoting G.A. Imports, Inc. v. Subaru Mid-America, Inc., 797 F.2d 1200, 1205 (8th Cir. 1986)).

625. *See, e.g.*, H. K. Porter Co. v. Wire Rope Corp. of Am., 367 F.2d 653, 663 (8th Cir. 1966); Wolters v. Prudential Ins. Co. of Am., 296 F.2d 140, 141 (8th Cir. 1961); Homolla v. Gluck, 248 F.2d 731, 735 (8th Cir. 1957).

626. *See* Standard Brands, Inc. v. Bateman, 184 F.2d 1002, 1011 (8th Cir. 1950), *cert. denied*, 340 U.S. 942 (1951).

627. Buder v. Becker, 185 F.2d 311, 315 (8th Cir. 1950).

628. Manning v. Jones, 349 F.2d 992, 995 (8th Cir. 1965).

629. *See* Freeman v. Schmidt Real Estate & Ins., Inc., 755 F.2d 135, 137 (8th Cir. 1985).

630. *See id.*; Grenz Super Valu v. Fix, 566 F.2d 614, 615 (8th Cir. 1977) (per curiam); *see also* Stevens v. Pike County Bank (*In re* Stevens), 829 F.2d 693, 696 (8th Cir. 1987) (per curiam) (Arnold, J., concurring) (stating that "deference is enhanced by the fact that the Bankruptcy Court reached the same conclusion as the District Court").

631. *See* Citizens Ins. Co. v. Foxbilt, Inc., 226 F.2d 641, 643 (8th Cir. 1955); Dierks Lumber & Coal Co. v. Barnett, 221 F.2d 695, 697 (8th Cir. 1955).

632. *Citizens Ins.*, 226 F.2d at 643; *Dierks Lumber & Coal Co.*, 221 F.2d at 697.

the rule surfaced in *Village of Brooten v. Cudahy Packing Co.*,[633] in which then-Judge Blackmun, for the court, wrote that deference to a ruling of a district court judge assigned outside his home state was appropriate.[634] More recent cases seem to reject this approach, however, by referring to the deference due *local* judges.[635]

Particularly since *Luke*, the Eighth Circuit has stated that it is not bound by the lower court rulings and is free to reverse if its review shows that the lower court applied local law incorrectly.[636] The court often has said that it will not apply the rule of deference to a state law ruling that is "fundamentally deficient in analysis or otherwise lacking in reasoned authority."[637] In *In re O'Neill's Shannon Village*,[638] the court

633. 291 F.2d 284 (8th Cir. 1961).

634. *Id.* at 288-89; *accord* St. Paul Hosp. & Casualty Co. v. Helsby, 304 F.2d 758, 759 (8th Cir. 1962) (per curiam).

635. *See, e.g.*, O'Brien v. Heggen, 705 F.2d 1001, 1005 (8th Cir. 1983); Bergstrom v. Sambo's Restaurants, Inc., 687 F.2d 1250, 1255 (8th Cir. 1982); Sperry Corp. v. City of Minneapolis, 680 F.2d 1234, 1238 (8th Cir. 1982); Hunter v. United States, 624 F.2d 833, 837 (8th Cir. 1980); Lamb v. Amalgamated Labor Life Ins. Co., 602 F.2d 155, 160 (8th Cir. 1979) (per curiam); McPherson v. Sunset Speedway, Inc., 594 F.2d 711, 714 (8th Cir. 1979); Bergstreser v. Mitchell, 577 F.2d 22, 25 (8th Cir. 1978); Northwestern Nat'l Bank v. American Beef Packers, Inc. (*In re* American Beef Packers, Inc.), 548 F.2d 246, 248 (8th Cir. 1977); Lienemann v. State Farm Mut. Auto Fire & Casualty Co., 540 F.2d 333, 342 (8th Cir. 1976); Sherrill v. Royal Indus., Inc., 526 F.2d 507, 510 (8th Cir. 1975); H. K. Porter Co. v. Wire Rope Corp. of Am., 367 F.2d 653, 663 (8th Cir. 1966); Manning v. Jones, 349 F.2d 992, 995 (8th Cir. 1965); Wash v. Western Empire Life Ins. Co., 298 F.2d 374, 378 (8th Cir. 1962).

636. *See, e.g.*, St. Paul Fire & Marine Ins. Co. v. Rock-Tenn Co., 787 F.2d 340, 341 (8th Cir. 1986); Hazen v. Pasley, 768 F.2d 226, 228 (8th Cir. 1985); Kansas State Bank v. Citizens Bank, 737 F.2d 1490, 1496 (8th Cir. 1984); Executive Fin. Servs., Inc. v. Garrison, 722 F.2d 417, 419 (8th Cir. 1983) (per curiam); Nemmers v. City of Dubuque, 716 F.2d 1194, 1197 (8th Cir. 1983); Hollman v. Liberty Mut. Ins. Co., 712 F.2d 1259, 1261 (8th Cir. 1983); Stratioti v. Bick, 704 F.2d 1052, 1054 (8th Cir. 1983); Kotval v. Gridley, 698 F.2d 344, 348 (8th Cir. 1983); Red Lobster Inns of Am., Inc. v. Lawyers Title Ins. Corp., 656 F.2d 381, 387 n.7 (8th Cir. 1981); Bazzano v. Rockwell Int'l Corp., 579 F.2d 465, 469 (8th Cir. 1978).

637. Hegg v. United States, 817 F.2d 1328, 1330 (8th Cir. 1987); *accord* Bridgman v. Cornwell Quality Tools Co., 831 F.2d 174, 175 (8th Cir. 1987) (per curiam); Sterling v. Forney, 813 F.2d 191, 192 (8th Cir. 1987); Prestidge v. Prestidge, 810 F.2d 159, 161 n.3 (8th Cir. 1987); Nelson v. Platte Valley State Bank & Trust Co., 805 F.2d 332, 334 (8th Cir. 1986); Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325, 1330 (8th Cir. 1985); Nebraska Pub. Power Dist. v. Austin Power, Inc., 773 F.2d 960, 972 (8th Cir. 1985); W.B. Farms v. Fremont Nat'l Bank & Trust Co., 765 F.2d 663, 666 (8th Cir. 1985); Leslie v. Bolen, 762 F.2d 663, 664 (8th Cir. 1985) (per curiam); Dabney v. Montgomery Ward & Co., 761 F.2d 494, 499 (8th Cir.), *cert. denied*, 474 U.S. 904 (1985); Slaaten v. Cliff's Drilling Co., 748 F.2d 1275, 1277 (8th Cir. 1984) (per curiam); Kansas City

explained:

> In this case, . . . we believe that deference to the District Court's reading of state law is inappropriate. We reach this conclusion for several reasons. First, there do not appear to be any decisions from the state courts of South Dakota addressing the issue of whether a valid security interest can be created in a liquor license. Second, the District Court's opinion is contrary to most of the cases decided since the enactment of the UCC by the various states; these cases appear to have been overlooked. Third, the District Court's opinion does not contain any reference to the UCC, nor does it indicate that the possible effect of the UCC was examined. Finally, we believe that the District Court's reliance on [an earlier district court decision] was misplaced. For these reasons, we decline to defer to the District Court's determination of the controlling question of South Dakota law. Instead, we make our own determination of what we believe the Supreme Court of South Dakota would hold if presented with the question now before us.[639]

Indeed, even before *Luke* the court noted that it could reverse if convinced that the state law was other than what the district court had held.[640] In a more recent case, the Eighth Circuit said that it "must independently assess the basis for [the district court's] interpretation."[641]

The circuit has recognized exceptions to the rule of deference.[642] In keeping with its view of state law decisions "fundamentally deficient in analysis or otherwise lacking in reasoned authority,"[643] the Eighth Circuit did not defer where the "district court gave no reason whatsoever for its conclusion."[644]

Power & Light Co. v. Burlington N. R.R., 707 F.2d 1002, 1003 (8th Cir. 1983); Gillette Dairy, Inc. v. Mallard Mfg. Corp., 707 F.2d 351, 353 (8th Cir. 1983); R.W. Murray Co. v. Shatterproof Glass Corp., 697 F.2d 818, 821 (8th Cir. 1983); Sperry Corp. v. City of Minneapolis, 680 F.2d 1234, 1238 (8th Cir. 1982); Ancom, Inc. v. E. R. Squibb & Sons, Inc. 658 F.2d 650, 654 (8th Cir. 1981).

638. 750 F.2d 679 (8th Cir. 1984).

639. *Id.* at 681; *see also* Russell v. New Amsterdam Casualty Co., 303 F.2d 674, 680 (8th Cir. 1962) (stating that while "reluctant to interfere . . . we are persuaded on the facts presented and the teachings of the Supreme Court of the United States, the courts of many jurisdictions and the other authorities above referred to, that the order of dismissal was erroneous").

640. *Russell*, 303 F.2d at 680; Scullen v. Braunberger, 225 F.2d 10, 14 (8th Cir. 1955); Nelson v. Westland Oil Co., 181 F.2d 371, 375 (8th Cir. 1950).

641. Parkerson v. Carrouth, 782 F.2d 1449, 1451 (8th Cir. 1986).

642. *See* Mogis v. Lyman-Richey Sand & Gravel Corp., 189 F.2d 130, 134 (8th Cir.) (noting that rule is "rationally and flexibly administered"), *cert. denied*, 342 U.S. 877 (1951).

643. *See Parkerson*, 782 F.2d at 1451; *supra* note 637 and accompanying text.

644. Dakota Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co., 554 F.2d 345, 354 (8th Cir.), *cert. denied*, 434 U.S. 877 (1977). This holding also comports with the Eighth Circuit's frequent statement that it will defer to the "considered views" of the local district court on state law. *See, e.g.*, Weiby v.

The court also has said that deference is inappropriate when a district court's state law ruling is based on an opinion that is not a "clear and persuasive indication" that a state supreme court has overruled its earlier holdings.[645] Finally, the Eighth Circuit has held that less deference is due to a decision made in the heat of trial than a ruling made in a studied fashion.[646]

NINTH CIRCUIT

The Ninth Circuit is the only circuit that expressly has rejected the rule of deference. In the 1984 case, *In re McLinn*,[647] a 6-5 majority of the Ninth Circuit sitting en banc overruled all earlier cases recognizing the rule of deference. The court adopted de novo review as the governing standard for appeals involving state law.[648]

Prior to *McLinn*, the Ninth Circuit had issued at least 115 decisions referring in some fashion to the rule of deference. In most of those cases, the court said it would not reverse district court rulings on state law unless "clearly wrong"[649] or "clearly erroneous."[650] In other cases, Ninth Circuit panels used less deferential terminology, according state law rulings "substantial deference,"[651] "great weight,"[652] or merely "deference."[653]

Farmers Mut. Auto. Ins. Co., 273 F.2d 327, 331 (8th Cir. 1960); W. Hodgman & Sons, Inc. v. Motis, 268 F.2d 82, 86 (8th Cir. 1959) (quoting National Bellas Hess, Inc. v. Kalis, 191 F.2d 739, 741 (8th Cir. 1951), *cert. denied*, 342 U.S. 933 (1952)); Western Oil & Fuel Co. v. Kemp, 245 F.2d 633, 645 (8th Cir. 1957).

645. Aguilar v. Flores, 549 F.2d 1161, 1163 (8th Cir. 1977) (quoting West v. American Tel. & Tel. Co., 311 U.S. 223 (1940)).

646. Jasperson v. Purolator Courier Corp., 765 F.2d 736, 739 (8th Cir. 1985).

647. 739 F.2d 1395 (9th Cir. 1984) (en banc).

648. *Id.* at 1403.

649. *See, e.g.*, Smith v. Sturm, Ruger & Co., 524 F.2d 776, 778 (9th Cir. 1975); Turnbull v. Bonkowski, 419 F.2d 104, 106 (9th Cir. 1969); Bower v. Bower, 255 F.2d 618, 619 (9th Cir. 1958) (per curiam); *see also* Safeco Ins. Co. of Am. v. Schwab, 739 F.2d 431, 433 n.1 (9th Cir. 1984) (referring to "clearly wrong" as proper standard during pendency of rehearing in *McLinn*).

650. *See, e.g.*, Knaefler v. Mack, 680 F.2d 671, 676 (9th Cir. 1982); Salmon River Canal Co. v. Bell Brand Ranches, Inc., 564 F.2d 1244, 1246 (9th Cir. 1977), *cert. denied*, 436 U.S. 918 (1978); Leh v. General Petroleum Corp., 330 F.2d 288, 290 (9th Cir. 1964), *rev'd on other grounds*, 832 U.S. 54 (1965).

651. *See, e.g.*, City of S. Pasadena v. Goldschmidt, 637 F.2d 677, 679 (9th Cir. 1981); Lewis v. Anderson, 615 F.2d 778, 781 (9th Cir. 1979), *cert. denied*, 449 U.S. 869 (1980); Hunt v. Sun Valley Co., 561 F.2d 744, 746 (9th Cir. 1977) (per curiam); United States v. Valley Nat'l Bank, 524 F.2d 199, 201 (9th Cir. 1975).

652. *See, e.g.*, United States v. Crain, 589 F.2d 996, 1001 n.8 (9th Cir. 1979); Ford v. International Harvester Co., 399 F.2d 749, 752 (9th Cir. 1968); State Farm Mut. Auto. Ins. Co. v. Thompson, 372 F.2d 256, 259 (9th Cir. 1967); Edwards v. American Home Assurance Co., 361 F.2d 622, 626 (9th Cir. 1966).

653. *See, e.g.*, Vu v. Singer Co., 706 F.2d 1027, 1030 n.2 (9th Cir.), *cert. de-*

In one noteworthy case, the court endorsed "clearly wrong" review, but said that "less deference" was warranted when two members of the appellate panel came from the same state as the district court judge.[654]

In some state law cases prior to 1984, the Ninth Circuit refused to apply the rule of deference at all. The court did not defer, for example, to the rulings of a district court judge sitting by designation outside his home state.[655] The court also did not defer to the decision of a resident judge applying the law of a different state pursuant to governing choice of law rules.[656] In *Lara & Zager v. Lara*,[657] the court chose not to defer to the district court's decision because state law changed after the district court had ruled.[658] The Ninth Circuit also did not defer to a district court's ruling when a separate federal bankruptcy judge, "equally versed in state law," earlier had reached the opposite conclusion on the same state law question.[659] Finally, some Ninth Circuit decisions state that little or no deference is warranted if the district court "relies on state law which offers only general guidance."[660]

McLinn swept aside these expressions of and exceptions to the rule of deference. Since 1984, the Ninth Circuit has reaffirmed on several occasions the propriety of reviewing state law questions de novo, citing *McLinn*.[661]

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nied, 464 U.S. 938 (1983); Kovacs v. Sun Valley Co., 499 F.2d 1105, 1106 (9th Cir. 1974) (per curiam); Klingebiel v. Lockheed Aircraft Corp., 494 F.2d 345, 347 (9th Cir. 1974); *see also* Allen v. Greyhound Lines, 656 F.2d 418, 421, 422 (9th Cir. 1981) (noting "deference" standard but not applying it).

654. Metropolitan Life Ins. Co. v. Kase, 718 F.2d 306, 307 (9th Cir. 1983).

655. *See* Yamaguchi v. State Farm Mut. Auto. Ins. Co., 706 F.2d 940, 946 n.5 (9th Cir. 1983).

656. *See* Henry Hope X-Ray Prods., Inc. v. Marron Carrel, Inc., 674 F.2d 1336, 1339 (9th Cir. 1982).

657. 731 F.2d 1455 (9th Cir. 1984).

658. *Id.* at 1458.

659. Anderson Land Co. v. Small Business Admin. (*In re* Big River Grain, Inc.), 718 F.2d 968, 970 (9th Cir. 1983) (per curiam).

660. McKesson Drug Co. v. Marcus (*In re* Mistura, Inc.), 705 F.2d 1496, 1497-98 & n.2 (9th Cir. 1983); Insurance Co. of N. Am. v. Howard, 679 F.2d 147, 150 (9th Cir. 1982); *see* Bank of Cal. v. Opie, 663 F.2d 977, 980 (9th Cir. 1981).

661. *See, e.g.*, S & R Metals, Inc. v. C. Itoh & Co., 859 F.2d 814, 816 (9th Cir. 1988); Doggett v. United States, 858 F.2d 555, 558 (9th Cir. 1988); Torres v. Goodyear Tire & Rubber Co., 857 F.2d 1293, 1295 (9th Cir. 1988), *withdrawn and superseded by* 867 F.2d 1234; Manzanita Park, Inc. v. Insurance Co. of N. A., 857 F.2d 549, 555 (9th Cir. 1988); State Farm Fire & Casualty Co. v. Jenner, 856 F.2d 1359, 1362 (9th Cir. 1988); Bulgo v. Munoz, 853 F.2d 710, 713 (9th Cir. 1988); Century 21 Real Estate Corp. v. Sandlin, 846 F.2d 1175, 1180 (9th Cir. 1988); Hutchinson v. United States, 841 F.2d 966, 967 (9th Cir. 1988); City of Angoon v. Hodel, 836 F.2d 1245, 1246 (9th Cir. 1988); Nevada VTN v. General

Nevertheless, one exception to the de novo standard of review initially appeared to survive *McLinn*. In *Gumataotao v. Government of Guam*,[662] the Ninth Circuit held that "decisions of local courts of United States territories on matters of purely local law will not be reversed unless clear and manifest error is shown."[663] Prior to *McLinn*, the Ninth Circuit affirmed all rulings on territorial law originating in Guam, including those in which the district court sat as a trial court of first instance, if "based upon a tenable theory and . . . not manifestly erroneous."[664] Early post-*McLinn* cases suggested that deference to the District Court of Guam did survive *McLinn* to some extent.[665] In these cases, the Ninth Circuit indicated that at least when the District Court of Guam was acting as a territorial appellate court, deferential review remained appropriate.[666] The court suggested that this result was proper for the same reason that federal appeals courts defer to a state court's interpretation of state law[667] and because the three-member Appellate Division of the District Court could engage in the "collaborative, deliberative process of appellate courts."[668]

In 1988, however, *People v. Yang*[669] created another change in Ninth Circuit law. The three-judge Appellate Division of the District Court of Guam affirmed the defendant's conviction in the Superior Court of Guam. Asserting error in the application of territorial law, the defendant appealed to the Ninth Circuit, which agreed to consider en banc "the appropriate standard of review for interpretations of Guam law made by the Appellate

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Ins. Co. of Am., 834 F.2d 770, 773 (9th Cir. 1987); Sax v. World Wide Press, Inc., 809 F.2d 610, 613 (9th Cir. 1987); Cunha v. Ward Foods, Inc., 804 F.2d 1418, 1423 (9th Cir. 1986); Church of Scientology v. Flynn, 744 F.2d 694, 695 n.1 (9th Cir. 1984); *see also* Sims Snowboards, Inc. v. Kelly, 863 F.2d 643, 644-45 (9th Cir. 1988) (applying de novo review to preliminary injunction order). *But cf.* First Idaho Corp. v. Davis, 867 F.2d 1241, 1242 (9th Cir. 1989) (stating "[t]his court gives great weight to a district court's determination of state law but reviews the decision as any other issue of law" and citing 1978 pre-*McLinn* authority).

662. 322 F.2d 580 (9th Cir. 1963).

663. *Id.* at 582.

664. Laguana v. Guam Visitors Bureau, 725 F.2d 519, 520 (9th Cir. 1984); *see also* Schenck v. Government of Guam, 609 F.2d 387, 390 (9th Cir. 1979) (upholding decision based on tenable theory).

665. Aguon v. Calvo, 829 F.2d 845, 847 (9th Cir. 1987); Brown v. Civil Serv. Comm'n, 818 F.2d 706, 708 (9th Cir. 1987); Hair v. Pangilinan, 816 F.2d 1341, 1342 (9th Cir. 1987); Electrical Constr. & Maintenance Co. v. Maeda Pac. Corp., 764 F.2d 619, 620 (9th Cir. 1985).

666. *See, e.g., Aguon*, 829 F.2d at 847.

667. *See Maeda Pacific*, 764 F.2d at 620 n.1.

668. *Brown*, 818 F.2d at 708.

669. 850 F.2d 507 (9th Cir. 1988) (en banc).

Division."[670] The en banc court found appropriate the "adoption of a strict de novo standard of review."[671] In doing so, the court relied heavily on *McLinn*.[672]

Yang thus clarified what standard of review applies to appeals taken from territorial multi-judge appellate division decisions. *Yang* does not necessarily dictate, however, the standard of review that will apply to decisions by a single judge district court. Because of the peculiar territorial judicial structure, two of the three appellate division judges may not be from the local district at all. The Ninth Circuit specifically relied on this fact in declining to afford deference to the Appellate Division decision in *Yang*.[673] Whether the Ninth Circuit would distinguish, and afford deference in, appeals from a decision by a single district court judge, who in fact resides in Guam, thus remains an open question.

The *Yang* opinion provides room to argue for deference to territorial law rulings by a district court judge, particularly because the Ninth Circuit did not disparage the First Circuit's practice of deferring to local district court interpretations of Puerto Rican law.[674] The Ninth Circuit, however, might distinguish the two territories on the basis that "Puerto Rico has an independent judicial system with a body of 'state' law determined by its own appellate and supreme courts,"[675] whereas Guam does not. In the end, resolution of this question should depend on studied application of the considerations developed in this Article, together with the informed sense of Ninth Circuit judges as to the relative abilities of district court judges and circuit court panels as finders of local law in this special context.

TENTH CIRCUIT

The Tenth Circuit has applied the rule of deference often and in the strongest terms. This study uncovered 141 cases in the circuit applying some version of the rule.

In more than half of these cases the court refused to overturn state law rulings of district courts unless the ruling was

670. *Id.* at 510.
671. *Id.*
672. *Id.*
673. *Id.*
674. *Id.* at 510 n.7; *see supra* note 324 and accompanying text.
675. *Yang*, 850 F.2d at 510 n.7.

"clear error,"[676] "clearly erroneous,"[677] or "clearly wrong,"[678]

676. *See, e.g.*, Smith v. Equitable Life Assurance Soc'y, 614 F.2d 720, 722 (10th Cir. 1980); Stephens Indus., Inc. v. Haskins & Sells, 438 F.2d 357, 359 (10th Cir. 1971); McDaniel v. Painter, 418 F.2d 545, 547 (10th Cir. 1969); *see also* Wilke v. Winters (*In re* Winters), 586 F.2d 1363, 1366 (10th Cir. 1978) (stating "demonstrably in error" standard); Sta-Rite Indus., Inc. v. Johnson, 453 F.2d 1192, 1195 (10th Cir. 1971) (stating "clearly in error" standard), *cert. denied*, 406 U.S. 958 (1972).

677. *See, e.g.*, Weatherhead v. Globe Int'l Inc., 832 F.2d 1226, 1228 (10th Cir. 1987); Hauser v. Public Serv. Co., 797 F.2d 876, 878 (10th Cir. 1986); Mullan v. Quickie Aircraft Corp., 797 F.2d 845, 850 (10th Cir. 1986); Herndon v. Seven Bar Flying Serv., Inc., 716 F.2d 1322, 1332 (10th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); King v. Horizon Corp., 701 F.2d 1313, 1315 (10th Cir. 1983); Loveridge v. Dreagoux, 678 F.2d 870, 877 (10th Cir. 1982); Obieli v. Campbell Soup Co., 623 F.2d 668, 670 (10th Cir. 1980); Chavez v. Kennecott Copper Corp., 547 F.2d 541, 543 (10th Cir. 1977); United States v. Hunt, 513 F.2d 129, 136 (10th Cir. 1975); Sade v. Northern Natural Gas Co., 501 F.2d 1003, 1005 (10th Cir. 1974); Julander v. Ford Motor Co., 488 F.2d 839, 844 (10th Cir. 1973); Gabaldon v. Westland Dev. Co., 485 F.2d 263, 266 (10th Cir. 1973); Wells v. Colorado College, 478 F.2d 158, 161 (10th Cir. 1973); Binkley v. Manufacturers Life Ins. Co., 471 F.2d 889, 891 (10th Cir.), *cert. denied*, 414 U.S. 877 (1973); Wyoming Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 467 F.2d 990, 993 (10th Cir. 1972); Brennan v. University of Kan., 451 F.2d 1287, 1291 (10th Cir. 1971); Traders State Bank v. Continental Ins. Co., 448 F.2d 280, 282 (10th Cir. 1971); Coca-Cola Bottling Co. v. Coca-Cola Co., 447 F.2d 635, 638 (10th Cir. 1971); McConnico v. Privett (*In re* Privett), 435 F.2d 261, 262 (10th Cir. 1970); Machinery Center, Inc. v. Anchor Nat'l Life Ins. Co., 434 F.2d 1, 7 (10th Cir. 1970); Nevin v. Hoffman, 431 F.2d 43, 46 (10th Cir. 1970); Freeman v. Heiman, 426 F.2d 1050, 1053 (10th Cir. 1970); Kasishke v. United States, 426 F.2d 429, 435 (10th Cir. 1970); Teague v. Grand River Dam Auth., 425 F.2d 130, 134 (10th Cir. 1970); Brunswick Corp. v. J & P, Inc., 424 F.2d 100, 104 (10th Cir. 1970); Equitable Fire & Marine Ins. Co. v. Allied Steel Constr. Co., 421 F.2d 512, 514 (10th Cir. 1970); Independent School Dist. 93 v. Western Sur. Co., 419 F.2d 78, 82 (10th Cir. 1969); Manufacturer's Nat'l Bank v. Hartmeister, 411 F.2d 173, 176 (10th Cir. 1969); Great-West Life Assurance Co. v. Levy, 382 F.2d 357, 359-60 (10th Cir. 1967); Smith v. Greyhound Lines, 382 F.2d 190, 192 (10th Cir. 1967); Scott v. Stocker, 380 F.2d 123, 126 (10th Cir. 1967); First Sec. Bank v. Crouse, 374 F.2d 17, 20 (10th Cir. 1967); Bushman Constr. Co. v. Conner, 351 F.2d 681, 684 (10th Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); Bledsoe v. United States, 349 F.2d 605, 606 (10th Cir. 1965); Loye v. Denver United States Nat'l Bank, 341 F.2d 402, 404 (10th Cir. 1965); McCallister v. M-A-C Fin. Co., 332 F.2d 633, 636 (10th Cir. 1964); Bartch v. United States, 330 F.2d 466, 467 (10th Cir. 1964); Kirby v. United States, 329 F.2d 735, 737 (10th Cir. 1964); Missouri Pac. R.R. v. American Refrigerator Transit Co., 328 F.2d 569, 569 (10th Cir. 1964); Mitton v. Granite State Fire Ins. Co., 196 F.2d 988, 992 (10th Cir. 1952).

678. *See, e.g.*, Mendoza v. K-Mart, Inc., 587 F.2d 1052, 1057 (10th Cir. 1978); Vallejos v. C. E. Glass Co., 583 F.2d 507, 512 (10th Cir. 1978); Chafin v. Aetna Ins. Co., 550 F.2d 575, 577 (10th Cir. 1976) (per curiam); Sloan v. Peabody Coal Co., 547 F.2d 115, 116 (10th Cir. 1977) (per curiam); Whitfield v. Gangas, 507 F.2d 880, 883 (10th Cir. 1974); American Mut. Ins. Co. v. Romero, 428 F.2d 870, 874 (10th Cir. 1970); *In re* Lehner, 427 F.2d 357, 358 (10th Cir. 1970) (per curiam); *In re* Cummings, 413 F.2d 1281, 1285 (10th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970); Pan American Petroleum Corp. v. Candelaria, 403 F.2d 351, 354 (10th Cir. 1968); Texaco, Inc. v. Pruitt, 396 F.2d 237, 243 (10th Cir. 1968);

or unless the appellate panel was "clearly convinced to the contrary."[679] A recent case flatly stated that "[i]n reviewing the interpretation and application of state law by a resident federal judge sitting in a diversity action, we are governed by the clearly erroneous standard."[680] The panel added that "[u]nder the clearly erroneous standard, reversal is required only if our review of the record leaves us with a definite and firm conviction that a mistake has been made."[681] In at least three cases employing the "clearly erroneous" test, moreover, concurring judges have pointedly but unsuccessfully criticized the application of such sweeping deference.[682]

Other cases use terminology similarly highlighting the Tenth Circuit's highly deferential approach. Some cases speak of the "extraordinary force"[683] or "extraordinary persuasive

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Industrial Indem. Co. v. Continental Casualty Co., 375 F.2d 183, 185 (10th Cir. 1967); First Nat'l Bank & Trust Co. v. United States Fidelity & Guar. Co., 347 F.2d 945, 947 (10th Cir. 1965); First Nat'l Bank & Trust Co. v. Foster, 346 F.2d 49, 51 (10th Cir. 1965); Pendergraft v. Commercial Standard Fire & Marine Co., 342 F.2d 427, 429 (10th Cir. 1965); Glenn v. State Farm Mut. Auto. Ins. Co., 341 F.2d 5, 9 (10th Cir. 1965); *see also* Denning v. Bolin Oil Co., 422 F.2d 55, 58 (10th Cir. 1970) (stating "clearly wrong" standard).

679. *See, e.g.*, Sutton v. Anderson, Clayton & Co., 448 F.2d 293, 297 (10th Cir. 1971); Mutual of Omaha Ins. Co. v. Russell, 402 F.2d 339, 344 n.14 (10th Cir. 1968), *cert. denied*, 394 U.S. 973 (1969); Adams v. Erickson, 394 F.2d 171, 173 (10th Cir. 1968); Stubblefield v. Johnson-Fagg, Inc., 379 F.2d 270, 273 (10th Cir. 1967); Jamaica Time Petroleum, Inc. v. Federal Ins. Co., 366 F.2d 156, 159 (10th Cir. 1966), *cert. denied*, 385 U.S. 1024 (1967); Cliborn v. Lincoln Nat'l Life Ins. Co., 332 F.2d 645, 648 (10th Cir. 1964); United States Fidelity Guar. Co. v. Lembke, 328 F.2d 569, 572 (10th Cir. 1964); F & S Constr. Co. v. Berube, 322 F.2d 782, 785 (10th Cir. 1963); Buell v. Sears, Roebuck & Co., 321 F.2d 468, 470 (10th Cir. 1963); Criqui v. Blaw-Knox Corp., 318 F.2d 811, 813 (10th Cir. 1963); Dallison v. Sears, Roebuck & Co., 313 F.2d 343, 347 (10th Cir. 1962).

680. Mullan v. Quickie Aircraft Corp., 797 F.2d 845, 850 (10th Cir. 1986); *accord* Anschutz Land & Livestock Co. v. Union Pac. R.R., 820 F.2d 338, 342 (10th Cir.), *cert. denied*, 108 S. Ct. 347 (1987); King v. Horizon Corp., 701 F.2d 1313, 1315 (10th Cir. 1983).

681. *Mullan*, 797 F.2d at 850. *But cf.* Binkley v. Manufacturers Life Ins. Co., 471 F.2d 889, 893 (10th Cir.), *cert. denied*, 414 U.S. 877 (1973) (Lewis, J., concurring) (arguing that "clearly erroneous" test should not be confused with language of Rule 52, but instead should be "words of convenience . . . subject to flexible application").

682. *See* Hauser v. Public Serv. Co., 797 F.2d 876, 881 (10th Cir. 1986) (Seymour, J., concurring); Carter v. City of Salina, 773 F.2d 251, 256-57 (10th Cir. 1985) (Seymour, J., concurring); *Binkley*, 471 F.2d at 893 (Lewis, C.J., concurring).

683. *See, e.g.*, Wells Fargo Business Credit v. American Bank of Commerce, 780 F.2d 871, 874 (10th Cir. 1985); McGehee v. Farmers Ins. Co., 734 F.2d 1422, 1424 (10th Cir. 1984); Campbell v. Joint Dist. 28-J, 704 F.2d 501, 504 (10th Cir. 1983); Amoco Prod. Co. v. Guild Trust, 636 F.2d 261, 264 (10th Cir. 1980), *cert. denied*, 452 U.S. 967 (1981); Farmers Alliance Mut. Ins. Co. v. Bakke, 619 F.2d

force"[684] of district court state law rulings. Others say such rulings are "persuasive and ordinarily accepted."[685] The Tenth Circuit has said that state law determinations are "presumed to be correct"[686] and that it will affirm if "the district court merely reached a permissible conclusion."[687]

In other cases the court has afforded "great deference,"[688] "great weight,"[689] "substantial weight,"[690] "particular force,"[691] "some deference,"[692] or "deference"[693] to the trial court's con-

885, 888 (10th Cir. 1980); Hartford v. Gibbons & Reed Co., 617 F.2d 567, 569 (10th Cir. 1980); Lyles v. American Hoist & Derrick Co., 614 F.2d 691, 694 (10th Cir. 1980); City of Aurora v. Bechtel Corp., 599 F.2d 382, 386 (10th Cir. 1979); Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144, 1148 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978); R. J. Enstrom Corp. v. Interceptor Corp., 555 F.2d 277, 282 (10th Cir. 1977); Volis v. Puritan Life Ins. Co., 548 F.2d 895, 901 (10th Cir. 1977); Joyce v. Davis, 539 F.2d 1262, 1265 (10th Cir. 1976).

684. *See, e.g.*, Neu v. Grant, 548 F.2d 281, 287 (10th Cir. 1977); DeBoer Constr. Inc. v. Reliance Ins. Co., 540 F.2d 486, 492 (10th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 33, 40 (10th Cir. 1975); Stevens v. Barnard, 512 F.2d 876, 880 (10th Cir. 1975); Permian Corp. v. Armco Steel Corp., 508 F.2d 68, 72 (10th Cir. 1974); Smith v. Clayton & Lambert Mfg. Co., 488 F.2d 1345, 1349 (10th Cir. 1973); Marken v. Goodall, 478 F.2d 1052, 1054 (10th Cir. 1973); Stafos v. Jarvis, 477 F.2d 369, 373 (10th Cir.), *cert. denied*, 414 U.S. 944 (1973); Hardberger & Smylie v. Employers Mut. Liab. Ins. Co., 444 F.2d 1318, 1320 (10th Cir. 1971); Hamblin v. Mountain States Tel. & Tel. Co., 271 F.2d 562, 564 n.1 (10th Cir. 1959); *see also* Port City State Bank v. American Nat'l Bank, 486 F.2d 196, 200 (10th Cir. 1973) (affording "extraordinary persuasive weight").

685. *See, e.g.*, Firestone Tire & Rubber Co. v. Pearson, 769 F.2d 1471, 1484 (10th Cir. 1985); Matthews v. IMC Mint Corp., 542 F.2d 544, 546 n.5 (10th Cir. 1976); Hardy Salt Co. v. Southern Pac. Transp. Co., 501 F.2d 1156, 1163 (10th Cir.), *cert. denied*, 419 U.S. 1033 (1974); Casper v. Neubert, 489 F.2d 543, 547 (10th Cir. 1973); Rios v. Cessna Fin. Corp., 488 F.2d 25, 27 (10th Cir. 1973); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237, 239 (10th Cir. 1973).

686. *See, e.g.*, Symons v. Mueller Co., 493 F.2d 972, 977 (10th Cir. 1974).

687. *See, e.g.*, State Distribs., Inc. v. Glenmore Distilleries Co., 738 F.2d 405, 415 (10th Cir. 1984).

688. *See, e.g.*, Rhody v. State Farm Mut. Ins. Co., 771 F.2d 1416, 1419 (10th Cir. 1985); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202, 204 (10th Cir. 1977).

689. *See, e.g.*, Cox v. Cox (*In re* Cox), 543 F.2d 1277, 1280 (10th Cir. 1976); Dell v. Heard, 532 F.2d 1330, 1332 (10th Cir. 1976); Land v. Roper Corp., 531 F.2d 445, 448 (10th Cir. 1976); Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1036 (10th Cir. 1975); Warde v. Davis, 494 F.2d 655, 658 (10th Cir. 1974); Westric Battery Co. v. Standard Elec. Co., 482 F.2d 1307, 1313 (10th Cir. 1973); United States v. Hershberger, 475 F.2d 677, 681 (10th Cir. 1973).

690. *See, e.g.*, Glenn Justice Mortage Co. v. First Nat'l Bank, 592 F.2d 567, 571 (10th Cir. 1979).

691. *See, e.g.*, An-son Corp. v. Holland-America Ins. Co., 767 F.2d 700, 704 (10th Cir. 1985).

692. *See, e.g.*, Corbitt v. Andersen, 778 F.2d 1471, 1475 (10th Cir. 1985); Co-

clusions. The Tenth Circuit also sometimes has indicated that it will "accept"[694] or "follow"[695] the district court's rulings or that it finds such rulings "persuasive."[696]

In a few cases, the Tenth Circuit has expressed the rule of deference in a more individualized fashion. In one case, for example, the court stated that "[w]hile the question is not free from doubt . . . we are constrained to leave undisturbed an interpretation . . . by an able [district judge] who from long experience is 'familiar with the intricacies and trends of local law and practice.' "[697] Another panel stated that "the trial judge, having been a member of the [state] Bar and a practitioner, is presumed to be in a superior position to predict" what the state court would decide.[698] The court also has noted the district court judge's prior work as a state court judge[699] and the lack of panel members from the forum state.[700] In a more unusual case, the court said it could not substitute its judgment "for that of the resident federal district judge who has given so much of his time, conscience and effort to this on-going case."[701] The court has applied the rule in interpreting a state statute, "particularly a statute pertaining to such local matters

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lonial Park Country Club v. Joan of Arc, 746 F.2d 1425, 1429 (10th Cir. 1984); Travelers Ins. Co. v. Panama-Williams, Inc., 597 F.2d 702, 704 (10th Cir. 1979).

693. *See, e.g.*, Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist., 739 F.2d 1472, 1477 (10th Cir. 1984); Aubertin v. Board of County Comm'rs, 588 F.2d 781, 785 (10th Cir. 1978); Moomey v. Massey Ferguson, Inc., 429 F.2d 1184, 1186 (10th Cir. 1970).

694. *See, e.g.*, Fulton v. Coppco, Inc., 407 F.2d 611, 614 (10th Cir. 1969); Gates v. Willford, 406 F.2d 890, 893 n.6 (10th Cir. 1969); Continental Casualty Co. v. Fireman's Fund Ins. Co., 403 F.2d 291, 336 (10th Cir. 1968); Foundation Reserve Ins. Co. v. Kelly, 388 F.2d 528, 531 n.4 (10th Cir. 1968); Employers Mut. Casualty Co. v. MFA Mut. Ins. Co., 384 F.2d 111, 115 (10th Cir. 1967); Solomon v. Downtowner of Tulsa, Inc., 357 F.2d 449, 451 (10th Cir. 1966); Coe v. Helmerich & Payne, Inc., 348 F.2d 1, 4 (10th Cir. 1964), *cert. denied*, 382 U.S. 980 (1966); Robert Porter & Sons v. National Distillers Prods. Co., 324 F.2d 202, 205 (10th Cir. 1963).

695. *See, e.g.*, Pittsburgh-Des Moines Steel Co. v. American Sur. Co., 365 F.2d 412, 416 (10th Cir. 1966).

696. *See, e.g.*, United States v. Wyoming Nat'l Bank, 505 F.2d 1064, 1068 (10th Cir. 1974); Vaughn v. Chrysler Corp., 442 F.2d 619, 621 (10th Cir.), *cert. denied*, 404 U.S. 857 (1971); *see also* Frase v. Henry, 444 F.2d 1228, 1232 (10th Cir. 1971) (stating "highly persuasive" standard).

697. Cranford v. Farnsworth & Chambers Co., 261 F.2d 8, 10 (10th Cir. 1958).

698. Fox v. Ford Motor Co., 575 F.2d 774, 783 (10th Cir. 1978).

699. *See* Dallison v. Sears, Roebuck & Co., 313 F.2d 343, 347 (10th Cir. 1962).

700. *See* Corbitt v. Andersen, 778 F.2d 1471, 1475 (10th Cir. 1985).

701. Battle v. Anderson, 564 F.2d 388, 400 (10th Cir. 1977).

as guard rails on bridges and traffic control signals."[702] One panel applying the rule noted that the appellant "chose to file its case in federal court, and hence is in a somewhat awkward position to now claim that the federal judge misunderstood [state] law."[703]

The Tenth Circuit has applied the rule of deference in cases raising a variety of legal questions. The court has cited the rule in cases involving tort claims, including wrongful death,[704] products liability,[705] personal injury,[706] loss of consortium,[707] and tortious interference with a contractual relationship.[708] It also has applied the rule in cases involving contract issues;[709] breaches of warranty;[710] fraud;[711] bankruptcy;[712] in-

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702. Aubertin v. Board of County Comm'rs, 588 F.2d 781, 785 (10th Cir. 1978).

703. Colonial Park Country Club v. Joan of Arc, 746 F.2d 1425, 1429 (10th Cir. 1984).

704. *E.g.*, Hauser v. Public Serv. Co., 797 F.2d 876, 878 (10th Cir. 1986); Fox v. Ford Motor Co., 575 F.2d 774, 783 (10th Cir. 1978); Sutton v. Anderson, Clayton & Co., 448 F.2d 293, 297 (10th Cir. 1971); Frase v. Henry, 444 F.2d 1228, 1232 (10th Cir. 1971); Barteh v. United States, 330 F.2d 466, 467 (10th Cir. 1964).

705. *See, e.g.*, Colonial Park Country Club v. Joan of Arc, 746 F.2d 1425, 1429 (10th Cir. 1984); Obieli v. Campbell Soup Co., 623 F.2d 668, 670 (10th Cir. 1980); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 33, 40 (10th Cir. 1975); Smith v. Clayton & Lambert Mfg. Co., 488 F.2d 1345, 1349 (10th Cir. 1973); Julander v. Ford Motor Co., 488 F.2d 839, 844 (10th Cir. 1973); Vaughn v. Chrysler Corp., 442 F.2d 619, 621 (10th Cir.), *cert. denied*, 404 U.S. 857 (1971).

706. *See, e.g.*, Mullan v. Quickie Aircraft Corp., 797 F.2d 845, 850 (10th Cir. 1986); Neu v. Grant, 548 F.2d 281, 287 (10th Cir. 1977); Adams v. Erickson, 394 F.2d 171, 173 (10th Cir. 1968); Stubblefield v. Johnson-Fagg, Inc., 379 F.2d 270, 273 (10th Cir. 1967); Coe v. Helmerich & Payne, Inc., 348 F.2d 1, 14 (10th Cir. 1964), *cert. denied*, 382 U.S. 980 (1966); Dallison v. Sears, Roebuck & Co., 313 F.2d 343, 347 (10th Cir. 1962).

707. *See, e.g.*, Criqui v. Blaw-Knox Corp., 318 F.2d 811, 814 (10th Cir. 1963).

708. *See, e.g.*, Corbitt v. Andersen, 778 F.2d 1471, 1475 (10th Cir. 1985).

709. *See, e.g.*, Firestone Tire & Rubber Co. v. Pearson, 769 F.2d 1471, 1484 (10th Cir. 1985); Loveridge v. Dreagoux, 678 F.2d 870, 877 (10th Cir. 1982); Warde v. Davis, 494 F.2d 655, 658 (10th Cir. 1974); Fulton v. Coppco, Inc., 407 F.2d 611, 614 (10th Cir. 1969); Missouri Pac. R.R. v. American Refrigerator Transit Co., 328 F.2d 569, 569 (10th Cir. 1964); Robert Porter & Sons v. National Distillers Prods. Co., 324 F.2d 202, 205 (10th Cir. 1963).

710. *See, e.g.*, Obieli v. Campbell Soup Co., 623 F.2d 668, 670 (10th Cir. 1980); F & S Constr. Co. v. Berube, 322 F.2d 782, 785 (10th Cir. 1963).

711. *See, e.g.*, Matthews v. IMC Mint Corp., 542 F.2d 544, 546 (10th Cir. 1976); Denning v. Bolin Oil Co., 422 F.2d 55, 58 (10th Cir. 1970).

712. *See, e.g.*, Cox v. Cox (*In re* Cox), 543 F.2d 1277, 1280 (10th Cir. 1976); Stafos v. Jarvis (*In re* Stafos), 477 F.2d 369, 372 (10th Cir.), *cert. denied*, 414 U.S. 944 (1973); Scott v. Stocker, 380 F.2d 123, 126 (10th Cir. 1967); Savage v. McNeany, 372 F.2d 199, 202 (10th Cir. 1967); Loye v. Denver United States

surance;[713] estate taxes;[714] property law, including eminent domain,[715] landlord/tenant law,[716] and actions to quiet title,[717] corporate law;[718] civil rights;[719] workers compensation;[720] appealability;[721] injunctive relief;[722] and banking law.[723] Application of the rule has resolved important cases involving recurring issues[724] and the court has relied on the rule to remand a state law issue to the trial judge rather than address it

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Nat'l Bank, 341 F.2d 402, 405 (10th Cir. 1965); Kirby v. United States, 329 F.2d 735, 737 (10th Cir. 1964).

713. *See, e.g.*, Rhody v. State Farm Mut. Ins. Co., 771 F.2d 1416, 1419 (10th Cir. 1985); Farmers Alliance Mut. Ins. Co. v. Bakke, 619 F.2d 885, 888 (10th Cir. 1980); DeBoer Constr., Inc. v. Reliance Ins. Co., 540 F.2d 486, 492 (10th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); Wyoming Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 467 F.2d 990, 993 (10th Cir. 1972); Hardberger & Smylie v. Employers Mut. Liab. Ins. Co., 444 F.2d 1318, 1320 (10th Cir. 1971); Equitable Fire & Marine Ins. Co. v. Allied Steel Constr. Co., 421 F.2d 512, 514 (10th Cir. 1970); Employers Mut. Casualty Co. v. MFA Mut. Ins. Co., 384 F.2d 111, 115 (10th Cir. 1967); Industrial Indem. Co. v. Continental Casualty Co., 375 F.2d 183, 185 (10th Cir. 1967).

714. *See, e.g.*, Estate of Selby v. United States, 726 F.2d 643, 645 (10th Cir. 1984); United States v. Hunt, 513 F.2d 129, 138 (10th Cir. 1975); Kasishke v. United States, 426 F.2d 429, 436 (10th Cir. 1970); Estate of Darby v. Wiseman, 323 F.2d 792, 795-96 (10th Cir. 1963).

715. *See, e.g.*, W. S. Ranch Co. v. Kaiser Steel Corp., 388 F.2d 257, 260 (10th Cir. 1967), *rev'd on other grounds*, 391 U.S. 593 (1968).

716. *See, e.g.*, Joyce v. Davis, 539 F.2d 1262, 1264 (10th Cir. 1976); Bledsoe v. United States, 349 F.2d 605, 606 (10th Cir. 1965).

717. *See, e.g.*, Amoco Prod. Co. v. Guild Trust, 636 F.2d 261, 264 (10th Cir. 1980), *cert. denied*, 452 U.S. 967 (1981); Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978).

718. *See, e.g.*, McDaniel v. Painter, 418 F.2d 545, 547 (10th Cir. 1969).

719. *See, e.g.*, Corbitt v. Andersen, 778 F.2d 1471, 1475 (10th Cir. 1985); Mendoza v. K-Mart, Inc., 587 F.2d 1052, 1057 (10th Cir. 1978); Battle v. Anderson, 564 F.2d 388, 403 (10th Cir. 1977).

720. *See, e.g.*, Lyles v. American Hoist & Derrick Co., 614 F.2d 691, 694 (10th Cir. 1980); Chavez v. Kennecott Copper Corp., 547 F.2d 541, 543 (10th Cir. 1977); Cranford v. Farnsworth & Chambers Co., 261 F.2d 8, 10 (10th Cir. 1958).

721. *See, e.g.*, Matthews v. IMC Mint Corp., 542 F.2d 544, 546 (10th Cir. 1976).

722. *See, e.g.*, Hardy Salt Co. v. Southern Pac. Transp. Co., 501 F.2d 1156, 1163 (10th Cir.), *cert. denied*, 419 U.S. 1033 (1974).

723. *See, e.g.*, Glenn Justice Mortgage Co. v. First Nat'l Bank, 592 F.2d 567, 571 (10th Cir. 1979); Port City State Bank v. American Nat'l Bank, 486 F.2d 196, 199 (10th Cir. 1973); First Nat'l Bank & Trust Co. v. United States Fidelity & Guar. Co., 347 F.2d 945, 947 (10th Cir. 1965).

724. *See, e.g.*, Fox v. Ford Motor Co., 575 F.2d 774, 782-83 (10th Cir. 1978) (deferring, in case involving crashworthiness doctrine, to district court "whether Wyoming would follow the majority or minority doctrine"); Smith v. Greyhound Lines, 382 F.2d 190, 192 (10th Cir. 1967) (deferring on issue of duty of care owed by common carrier to passenger).

in the first instance.[725]

Despite its strong expressions of the rule of deference, the Tenth Circuit has recognized limits to the rule.[726] One court, affirming the district court, stated that the ruling of the lower court must be "within the general authorities on the point."[727] Moreover, in *Estate of Darby v. Wiseman*,[728] the court said it would accept the view of the district court judge only if "convinced that it is right."[729] The court then reversed because it was "convinced that the trial judge was wrong."[730] Such ambivalent expressions of the rule of deference are, however, rare in the Tenth Circuit.

The Tenth Circuit also has recognized exceptions to the rule. In at least two cases, the court has refused to defer because the lower court failed to cite any authority or set out its analysis of state law.[731] In another, related case, the appellate panel refused to defer because the district judge himself had deferred entirely to a state trial judge's determination in a case that involved significant federal tax consequences.[732] The circuit has declined to defer to district court dictum[733] and has downplayed the significance of the rule of deference when "lower state courts have issued an array of decisions subsequent to the [district court's] decision" concerning the issue at hand.[734] In addition, the court has recognized that the rule of deference does not apply when there is a disagreement among district judges within the circuit about the proper interpretation of state law.[735]

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725. *See* Glenn v. State Farm Mut. Auto. Ins. Co., 341 F.2d 5, 9 (10th Cir. 1965).

726. *See, e.g.*, Hartford v. Gibbons & Reed Co., 617 F.2d 567, 569 (10th Cir. 1980) (noting that rule of deference applies "where there are no controlling state decisions"); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202, 204 (10th Cir. 1977) (same).

727. Robert Porter & Sons v. National Distillers Prods. Co., 324 F.2d 202, 205 (10th Cir. 1963).

728. 323 F.2d 792 (10th Cir. 1963).

729. *Id.* at 796.

730. *Id.*

731. *See* Weiss v. United States, 787 F.2d 518, 525 (10th Cir. 1986); *see also* Carter v. City of Salina, 773 F.2d 251, 254 (10th Cir. 1985) (overturning district court despite rule, noting that no state "law was cited or relied upon by the district court" in unique case).

732. Estate of Selby v. United States, 726 F.2d 643, 645-46 (10th Cir. 1984).

733. Maughan v. SW Servicing, Inc., 758 F.2d 1381, 1384 n.2 (10th Cir. 1985).

734. Rawson v. Sears, Roebuck & Co., 822 F.2d 908, 911-12 nn.6-7 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 699 (1988).

735. McGehee v. Farmers Ins. Co., 734 F.2d 1422, 1424 (10th Cir. 1984); *see Rawson*, 822 F.2d at 911 n.7; *Maughan*, 758 F.2d at 1384 n.2.

Finally, in *Wilson v. Al McCord, Inc.*,[736] a Tenth Circuit panel added a new wrinkle to Tenth Circuit law concerning the rule of deference. The court wrote that "[t]he issue for our consideration is the trial judge's legal interpretation of state law to which we give some deference, but ultimately review de novo."[737] The Court's opinion contained no discussion whatsoever of earlier Tenth Circuit law, which repeatedly endorsed the "clearly erroneous" standard.[738] Moreover, two judges on the panel earlier had voiced dissatisfaction with the "clear error" review applied by other Tenth Circuit judges.[739] The impact of *Wilson* therefore is likely to be limited. At the least, however, the *Wilson* decision reinforces the need for focused en banc consideration of the rule of deference in the Tenth Circuit.

ELEVENTH CIRCUIT

The Eleventh Circuit recognizes the rule of deference. Thus, in *Alabama Electric Cooperative v. First National Bank*,[740] the court stated that "[i]n the absence of guiding [state court] decisions, we are bound to follow the principle . . . that the interpretation of state law by a federal district judge sitting in that state is entitled to deference."[741] Consistent with its general practice, the court adopted this principle by following earlier Fifth Circuit precedent.[742] Moreover, the court has agreed with the Fifth Circuit that:

> This policy is grounded in the rationale that a federal trial judge who sits in a particular state and has practiced before its courts is "better able to resolve certain questions about the law of that state than is some other federal judge who has no such personal acquaintance with the law of the state."[743]

Despite its reliance on Fifth Circuit precedent, the Eleventh Circuit's statement of the rule of deference generally has been less emphatic than the Fifth Circuit's. In only one of the Eleventh Circuit decisions identified in this study did the court apply the "great weight" formulation typically used by the

736. 858 F.2d 1469 (10th Cir. 1988).
737. *Id.* at 1473.
738. *See supra* notes 677-81.
739. *See supra* note 682.
740. 684 F.2d 789 (11th Cir. 1982).
741. *Id.* at 792 (applying rule with little additional analysis).
742. *Id.*
743. Gregory v. Massachusetts Mut. Life Ins. Co., 764 F.2d 1437, 1441 (11th Cir. 1985).

Fifth Circuit.[744] Most often, as in *Alabama Electric Cooperative*, the Eleventh Circuit has spoken only in terms of "deference."[745] In a recent statement on the subject, however, the Eleventh Circuit cited Fifth Circuit authority in affording "substantial weight" to the district court's ruling.[746] In two earlier decisions, the court also used somewhat broader language, stating: "We generally defer to an interpretation of state law by a federal district judge sitting in that state, provided his interpretation appears to be reasonable and consistent with the state's law."[747]

Notwithstanding its recognition of the rule of deference, in one case the Eleventh Circuit asserted, without more, that a state law question "is a question of law subject to de novo review by this court."[748] This study revealed no Eleventh Circuit cases recognizing exceptions to the rule of deference.

THE DISTRICT OF COLUMBIA AND FEDERAL CIRCUITS

The District of Columbia Circuit sometimes encounters questions of local District of Columbia law. In *Hull v. Eaton Corp.*,[749] for example, the court had to predict what test the District of Columbia courts would adopt for liability in product design-defect cases.[750] The circuit affirmed the district court's ruling, quoting with approval a Tenth Circuit opinion suggesting that the local district judge's views on local law "carry extraordinary force on appeal."[751] The court went on to say that "[a]pplication of this principle seems particularly appropri-

744. *Id.* at 1441 (stating "we are influenced by 'the great weight to be given the determination of local law by the district court in diversity cases' ").

745. National Fire Ins. Co. v. Housing Dev. Co., 827 F.2d 1475, 1480 (11th Cir. 1987); Steele v. Ford Motor Credit Co., 783 F.2d 1016, 1018 (11th Cir. 1986); Commercial Union Ins. Co. v. Sepco Corp., 765 F.2d 1543, 1545 (11th Cir. 1985); Clay v. Equifax, Inc., 762 F.2d 952, 958 (11th Cir. 1985); Brown-Marx Assocs., Ltd. v. Emigrant Savings Bank, 703 F.2d 1361, 1371 (11th Cir. 1983); Burger King Corp. v. Mason, 710 F.2d 1480, 1491 n.6 (11th Cir.), *cert. denied*, 465 U.S. 1102 (1983).

746. Scurlock v. City of Lynn Haven, 858 F.2d 1521, 1526 (11th Cir. 1988).

747. King v. Guardian Life Ins. Co. of Am., 686 F.2d 894, 899 (11th Cir. 1982) (quoting Faser v. Sears, Roebuck & Co., 674 F.2d 856, 859 (11th Cir. 1982)).

748. Schwartz v. Florida Bd. of Regents, 807 F.2d 901, 905 (11th Cir. 1987).

749. 825 F.2d 448 (D.C. Cir. 1987).

750. *Id.* at 453-54.

751. *Id.* at 454 n.9. Indeed, the court also cited, with seeming approval, a case endorsing review of such rulings pursuant to the "clearly erroneous" standard. *See id.*

ate here, where the district judge spent many years as a judge in the District of Columbia court system and therefore has added expertise in local law."[752] *Hull* does not stand alone. At least one other case from the circuit has cited the rule of deference and its rationale.[753]

This study revealed no cases in the Federal Circuit discussing the rule of deference, even though the rule of deference may be especially appropriate in this circuit of unlimited geographic jurisdiction. The Supreme Court recently adverted to the rule of deference in discussing Federal Circuit review of state law issues,[754] a reference that may be cited to support appellee arguments that the Federal Circuit should apply the rule of deference in its future state law cases.[755]

APPENDIX II

THE EXCEPTIONS TO THE RULE OF DEFERENCE

This Appendix provides information otherwise unavailable in the legal literature, by collecting in one place all the exceptions to the rule of deference recognized in the circuits and the case authority supporting those exceptions. It also sets forth in brief fashion the justifications for these exceptions and considers whether the justifications are persuasive.

The simplest exceptions to the rule of deference arise when district court judges apply local law while sitting by designation outside their home states,[756] or when resident judges apply nonlocal law under governing choice of law rules.[757] In such cases, the rule's underlying rationale of local law expertise is inapposite; applying the rule therefore makes no sense. Nevertheless, in *Village of Brooten v. Cudahy Packing Co.*,[758] the Eighth Circuit afforded "great reliance" in such

752. *Id.*

753. *See* Abex Corp. v. Maryland Casualty Co., 790 F.2d 119, 125 n.29 (D.C. Cir. 1986); *cf.* Railway Labor Executives' Ass'n v. United States R.R. Retirement Bd., 749 F.2d 856, 860 n.7 (D.C. Cir. 1984) (distinguishing district court cases applying foreign law). The District of Columbia Circuit's deference to federal district courts is, of course, to be distinguished from the Court's well-established "deference on matters of local law" to the local District of Columbia courts. Keener v. Washington Metro. Area Transit Auth., 800 F.2d 1173, 1178 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1375 (1987).

754. United States v. Hohri, 107 S. Ct. 2246, 2253 n.6 (1987).

755. *But see supra* note 102 (discussing *Hohri*).

756. *See supra* note 655 and accompanying text.

757. *See supra* notes 561, 635, 656 and accompanying text.

758. 291 F.2d 284 (8th Cir. 1961).

a case.[759] Given the presumed expertise justification for the rule, this decision is incorrect. Courts facing similar cases in the future should not, and undoubtedly will not, follow *Village of Brooten*.[760]

Circuit courts citing the rule of deference also have declined to defer to local judges' rulings on their own states' law in at least seven separate instances. First, circuit court panels properly have refused to defer to district court decisions followed by significant changes in state law.[761] Deference in such cases is inappropriate because even if district court judges are viewed as state law experts, they have not focused their expertise on the relevant legal materials. Second, a number of courts have declined to apply deferential review in the face of a "a sharp conflict among the judges of [the] district."[762] This exception to the rule also is sound. Even assuming that special district court expertise justifies the rule of deference, when a conflict arises between experts only the appellate court can resolve the conflict. In addition, it would be unseemly and unfair for the result in such cases to rest solely on which district court judge is assigned to the case.[763]

Third, in *Caspary v. Louisiana Land & Exploration Co.*,[764] the Fourth Circuit refused to apply the rule of deference because a panel member residing in the same state as the district court judge disagreed with that judge's reading of local law.[765] This situation is analogous to a disagreement among district

759. *Id.* at 288-89.

760. *See supra* note 635 and accompanying text.

761. *See supra* notes 562, 658, 734 and accompanying text.

762. Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315, 319 (1st Cir. 1978). For cases in accord, see *supra* notes 562-63, 659, 735 and accompanying text.

763. *See* Thompson & Oakley, *supra* note 122, at 12. (stating that "[t]he justice system suffers when results turn too much upon the luck of the draw").

764. 707 F.2d 735 (4th Cir. 1983).

765. *Id.* at 788 n.5; *see also* Metropolitan Life Ins. Co. v. Kase, 718 F.2d 306, 307 (9th Cir. 1983) (affording less deference when two appeals court judges came from same state as district court judge); *cf. supra* text accompanying note 359. A "same state panel member" exception may find support in the specific rationale for the rule articulated by some circuits. These courts emphasize the expertise of local district court judges when compared to federal appeals court judges who have "no such personal acquaintance with the law of the state." *See supra* notes 401, 418, 743 and accompanying text. An appeals court judge from the same state as the district court judge surely *does* have a "personal acquaintance" with his or her own state's law. Thus, under this formulation of the expertise rationale, the rule of deference should not apply if one panel member is from the district court judge's state.

court judges. The court in *Caspary* thus properly reasoned that the opposing view of the "in-state" panel member "neutralize[d]" any special district court competence.[766]

Fourth, a Second Circuit panel chose not to apply the rule of deference when nothing suggested the local district judge "was applying any special [state law] rule different from that prevailing elsewhere."[767] In a similar vein, the First Circuit did not apply the rule when the district court's state law ruling rested primarily on a misreading of earlier First Circuit authorities.[768] These holdings, although debatable, represent the better application of the rule's underlying rationale. The district court judge who simply applies the "general rule," or purports to follow some earlier federal court precedent, has not called on any *special* knowledge about his or her *own* state's law.[769]

Fifth, the Seventh Circuit has indicated that "less than the usual deference may be due" when a district court "confesse[s] its own uncertainty" by certifying an interlocutory appeal of the state law issue.[770] This exception seems to run counter to the rule's rationale because even expert analysis can produce equivocal conclusions. This exception, however, does not rest on a perceived lack of expertise. Rather, deference is reduced precisely because the "expert" decisionmaker found the decision a close one; it makes no sense to let an evenly balanced judgment push hard on either side of the appellate court's decisional scales.

Sixth, courts in a few cases have mitigated the effect of the rule of deference where special facts suggest the lower court's reasoning may have been faulty or incomplete. One panel, for

766. *See Caspary*, 707 F.2d at 788 n.5. Notably, the Court in *Caspary* did not apply the rule of deference even though the appellate panel included a *second* judge from the *same* state who *agreed* with the district court's conclusion. *See id.* If the *Caspary* exception takes hold, it follows a fortiori that the rule of deference is inapplicable when a single "in state" judge sits on the appeals panel and disagrees with the district court's view of state law.

767. Ryan v. St. Johnsbury & Lamoille County R.R., 290 F.2d 350, 352 (2d Cir. 1961).

768. *See supra* note 342 and accompanying text; *see also supra* note 639 and accompanying text (discussing Eighth Circuit's refusal to follow rule).

769. It is noteworthy in regard to this "general law" exception that courts *have* applied the rule of deference in cases involving interpretation of the Uniform Commercial Code. *See supra* notes 440, 507, 571, 710 and accompanying text. Such cases concern application of a "quasi-national" body of law effective in nearly identical form throughout each circuit. It thus seems inappropriate in such cases for circuit courts to defer on the basis of the district court's supposed local law expertise.

770. *See supra* note 565 and accompanying text.

example, refused to defer to a ruling set forth in dictum.[771] In other cases, courts have declined to defer to district court decisions made in a hurried or unstudied fashion or without the help of briefing by counsel.[772] These panels have been perceptive in taking a broad view of district court "expertise."[773] In the future, courts should emulate this approach.

Finally, appeals court panels have declined to defer to district court rulings unsupported by meaningful reasoning.[774] A Tenth Circuit panel, for example, refused to defer to the disposition of a "novel question" of state law where the district court "neither cited [state law] authority nor engaged in any analysis."[775] Decisions in the Fifth and Ninth Circuits have gone even further, indicating that little or no deference is warranted when the district court judge relies on state law offering only general guidance.[776]

These cases are the most difficult to reconcile with the logic of the rule of deference. The rule exists, after all, because of the "*presumption* that a district court judge is especially familiar with the law of the state,"[777] particularly the "trends" in that law.[778] Nevertheless, it is plausible for a circuit panel to assume that a judge who provides no significant "proof" of special expertise had no such expertise to draw upon. Particularly in light of the broader weaknesses of the rule of deference,

771. *See supra* note 733 and accompanying text.

772. *See supra* notes 517, 639, 646 and accompanying text; *cf. supra* notes 551, 627-28 and accompanying text (discussing cases in which district court's ruling was particularly careful). In a similar vein, the Fifth Circuit has refused to defer whenever the lower court's conclusion is "against the more cogent reasoning of the best and most widespread authority." Stool v. J. C. Penney Co., 404 F.2d 562, 563 (5th Cir. 1968).

773. *See generally supra* text following note 128.

774. *See supra* notes 347, 411-13, 469-71, 637, 644, 731 and accompanying text; *see also supra* note 732 and accompanying text (discussing circuit refusal to defer because district court did not cite authority or analyze state law). In addition, the Eighth Circuit has stated broadly and often that it will not defer to a state law ruling if "it is 'fundamentally deficient in analysis or otherwise lacking in reasoned authority.'" Kansas City Power & Light Co. v. Burlington N. R.R., 707 F.2d 1002, 1003 (8th Cir. 1983) (quoting Ancon, Inc. v. E. R. Squibb & Sons, Inc., 658 F.2d 650, 654 (8th Cir. 1981)).

775. Weiss v. United States, 787 F.2d 518, 525 (10th Cir. 1986).

776. *See* McKesson Drug Co. v. Mareus (*In re* Mistura, Inc.), 705 F.2d 1496, 1497 (9th Cir. 1983); Insurance Co. of N. Am. v. Howard, 679 F.2d 147, 150 (9th Cir. 1982); Black v. Fidelity & Guar. Ins. Underwriters, Inc., 582 F.2d 984, 987 (5th Cir. 1978).

777. Beard v. J. I. Case Co., 823 F.2d 1095, 1097 n.3 (7th Cir. 1987) (emphasis added).

778. *See supra* text accompanying note 41.

courts that continue to apply the rule of deference should decline to defer to unexplained or vaguely explained decisions that give no signal that true expertise is at work.